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No. 17046 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CAL-NEVA LODGE, INC., a Nevada corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT CAL-NEVA LODGE, INC.

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FEB 14 1961

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No. 17046
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CAL-NEVA LODGE, INC., a Nevada corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

**OPENING BRIEF OF APPELLANT
CAL-NEVA LODGE, INC.**

Specification of Error.

That the District Court erred in its Order of June 27, 1960, in reversing the Referee's Order of April 18, 1959, and in thereby allowing the claim of the United States.

Jurisdiction.

Appellate jurisdiction over the instant matter exists by virtue of the provisions of Section 24(a) of the Bankruptcy Act.

Facts.

On December 31, 1948, pursuant to an agreement entered into in the State of California [Tr. of R. p. 31], Appellant purchased the Cal-Neva Lodge from Elmer F. Remmer and Helen L. Remmer. Appellant executed

a first deed of trust on the Cal-Neva Lodge property in favor of the Remmers to secure the unpaid portion of the purchase price, the balance owing being evidenced by a note bearing interest at the rate of 4% per annum [Tr. of R. pp. 20, 21, 36].

Subsequently, the Remmers became involved in tax difficulties with the United States. On June 1, 1953, the United States served a levy upon Appellant under Section 3692 of the Internal Revenue Code of 1939, attempting thereby to seize the alleged indebtedness owing to the Remmers [Tr. of R. pp. 36, 37, 4, 7, 8, 11, 17]. As of June 1, 1953, the first trust deed in favor of the Remmers secured a principal balance in the sum of \$198,333.34 [Tr. of R. pp. 32, 37]. After the levy of June 1, 1953, Appellant sold the Cal-Neva Lodge property to Park Lake Enterprises, Inc., which agreed to assume the secured obligation to the Remmers [Tr. of R. p. 38]. The United States made no attempt to foreclose the Remmer trust deed on the Cal-Neva Lodge property subsequent to its levy of June 1, 1953 [Tr. of R. p. 32]. Appellant did not respond to the levy of the United States of June 1, 1953 [Tr. of R. p. 32]. An action by the United States against Park Lake Enterprises, Inc. to collect the alleged indebtedness to the Remmers is presently pending in the District Court of Nevada [Tr. of R. p. 21]. Appellant instituted proceedings under Chapter XI of the Bankruptcy Act on November 12, 1955 [Tr. of R. p. 29]. Thereafter the United States filed a proof of claim which was amended on several occasions seeking recovery from Appellant under Section 64 of the Bankruptcy Act of the sum of \$198,333.34 plus unpaid interest thereon at the rate of 4% per annum until June 1, 1953, plus interest at the rate of 6% per annum there-

after to the date of the petition on the principal and interest owing as of June 1, 1953 [Tr. of R. pp. 3-18]. Appellant filed its objections to the proof of claim of the United States [Tr. of R. pp. 18-20] which objections were sustained by the Referee [Tr. of R. pp. 20-25, 28-33]. The United States petitioned the District Court for review of the Referee's order [Tr. of R. pp. 26-28]. By its order of June 27, 1960, the District Court reversed the Referee and sustained the claim of the United States [Tr. of R. pp. 34-46].

Statutes Involved.

SECTION 57(j), BANKRUPTCY ACT:

“Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.”

SECTION 3710, INTERNAL REVENUE CODE OF 1939:

“Section 3710. Surrender of Property Subject to Distraint.

(a) Requirement. Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.”

Issues Presented.

1. Where the United States levies upon a person indebted to its taxpayer, does it acquire any better rights against the person levied upon than those possessed by its taxpayer?

2. Does state or federal law determine the nature and extent of the property or rights to property in possession of the taxpayer's debtor at the time of a levy on said debtor by the United States?

3. Where by the law of the state the taxpayer, by virtue of his being the beneficiary of a purchase money trust deed, is entitled to no deficiency against his trustor-debtor, and must look only to his security, may the United States ignore the security and levy upon the trustor-debtor and thereby force him to pay over the principal indebtedness?

4. Does Section 57(j) of the Bankruptcy Act require the disallowance as a penalty of a claim by the United States against the estate of a debtor under Section 3710(b) of the Internal Revenue Code of 1939 where the United States has contributed nothing to the debtor's estate and has suffered no loss by virtue of the debtor's failure to respond to a demand made under Section 3710(a) of the Internal Revenue Code of 1939?

ARGUMENT.

I.

By Its Levy Under Section 3692 of the Internal Revenue Code of 1939 the United States Acquired No Better Rights Against Cal-Neva Lodge, Inc., Than Those Possessed by Its Tax Debtor.

Section 3692 of the Internal Revenue Code of 1939 created a “. . . statutory attachment and garnishment in which the service of notice provided by statute takes the place of the court process in the ordinary garnishment proceeding.” *United States v. Eiland* (C. A. 4th), 223 F. 2d 118, 121. A creditor seeking to reach an indebtedness owing to his debtor by a third person by attachment or garnishment acquires no greater rights against the third person than those possessed by his debtor, even though that creditor is the sovereign. *United States v. Winnett* (C. A. 9th), 165 F. 2d 149. “Under Section . . . 3710(a) of the Internal Revenue Code . . . the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon.” *United States v. Winnett, supra*, at p. 151. See also *United States v. Graham*, 96 Fed. Supp. 318, aff’d *per curiam sub. nom. State of California v. United States* (C. A. 9th), 195 F. 2d 530, cert. den., 73 S. Ct. 36.

II.

State Law Determines the Rights to Which the United States Succeeded by Virtue of Its Levy.

Federal tax lien statutes create no property rights but merely attach federally defined consequences to property rights created under state law. *United States v. Bess*, 78 S. Ct. 1054; *United States v. Winnett* (C. A. 9th), 165 F. 2d 149; *United States v. American Nat. Bank of Jacksonville* (C. A. 5th), 255 F. 2d 504; *Fidelity & Deposit Co. v. New York City Housing Authority* (C. A. 2d), 241 F. 2d 142. Thus, it has been held that a tax lien arising prior to the death of a taxpayer could reach only the cash surrender value of the taxpayer's policies of life insurance which was available to him at the time of his death rather than the full proceeds of the policies payable to his beneficiary by virtue of his death, for the reason that the taxpayer's property interest at the time of levy was limited by the policy contract as enforced by state law to the cash surrender value only, *United States v. Bess, supra*; that a tax lien perfected against a taxpayer prior to the execution of a mortgage by the taxpayer and his spouse on real property held by them as tenants by the entirety could not defeat the subsequent mortgage for the reason that under state law the taxpayer's interest in a tenancy by the entirety is not one which is subject to attachment or in any manner lienable, *United States v. American Nat. Bank of Jacksonville, supra*; that a levy upon a taxpayer's debtor did not deprive the debtor

of his right of offset against the taxpayer because by state law, the debtor had an equitable right of offset at the time of levy, *United States v. Winnett, supra*; and that a fund allegedly payable to a taxpayer by a housing authority for construction services rendered was not a lienable property right for the reason that under state law the taxpayer's failure to pay material and labor claims divested him of any interest in said fund. *Fidelity & Deposit Co. v. New York City Housing Authority, supra*.

Since it is a defense to a levy under Section 3692 and a demand for surrender under Section 3710 that the person levied upon was not in possession of any property of the taxpayer which was subject to levy, *Bank of Nevada v. United States* (C. A. 9th), 251 F. 2d 820, it therefore becomes necessary to look to state law to determine whether or not Cal-Neva Lodge, Inc., was in possession of any property of the Remmers which was subject to levy on June 1, 1953.

III.

Cal-Neva Lodge, Inc., Was Not Indebted to the Remmers as of June 1, 1953, the Date of Levy by the United States.

The deed of trust given the Remmers by Cal-Neva Lodge, Inc., on December 31, 1948, in lieu of a portion of the purchase price was a purchase money trust deed. *Peterson v. Wilson*, 88 Cal. App. 2d 617.

In California there is only one form of action available to a mortgagee holding a mortgage securing a de-

faulted note who desires a personal judgment against his mortgagor and that is for a judicial foreclosure and deficiency determination. Section 726, California Code of Civil Procedure. Section 726 of the California Code of Civil Procedure applies to trust deeds as well as mortgages. *Bank of Italy v. Bentley*, 217 Cal. 644.

In an agreement wherein a non-purchase money trust deed is utilized to secure a note obligation, borrower and lender impliedly contract that the land will constitute the primary fund to secure the debt and that a valid sale under the deed of trust is a prerequisite before any action can be maintained on the note. *Bank of Italy v. Bentley, supra*.

Not only does Section 726 of the California Code of Civil Procedure limit the beneficiary of a trust deed to one form of action, but also, Section 580b of the California Code of Civil Procedure deprives that beneficiary of any right to a deficiency where his trust deed is of the purchase money variety. *Brown v. Jensen*, 41 Cal. 2d 193. Further, it has been held that in a purchase money transaction, there is no debtor-creditor relationship between buyer and seller, the seller having only a security interest in the land to the extent of the balance due. *Jeanese v. Surety Title & Guaranty Co.*, 176 Cal. App. 2d 449.

IV.

The Levy by the United States on Cal-Neva Lodge, Inc., Under Section 3692 of the Internal Revenue Act of 1939 Was Meaningless in That the United States Failed Thereby to Seize Any Property or Rights to Property of Its Tax Debtors.

By its levy of June 1, 1953 the United States, standing in the shoes of the Remmers, *United States v. Winnett* (C. A. 9th), 165 F. 2d 149; *United States v. Graham*, 96 Fed. Supp. 318, aff'd *per curiam sub. nom. State of California v. The United States* (C. A. 9th), 195 F. 2d 530, cert. den., 73 S. Ct. 36, and possessed of only those rights had by the Remmers under state law, *United States v. Bess*, 78 S. Ct. 1054; *United States v. American Nat. Bank of Jacksonville* (C. A. 5th), 255 F. 2d 504; *United States v. Winnett, supra*; *Fidelity & Deposit Co. v. New York City Housing Authority* (C. A. 2d), 241 F. 2d 142, reached no indebtedness owing by Cal-Neva Lodge, Inc. to the Remmers, Section 726, California Code of Civil Procedure; Section 580b, California Code of Civil Procedure; *Jeanese, Inc. v. Surety Title & Guaranty Co.*, 176 Cal. App. 2d 499, which rendered it a creditor of Cal-Neva Lodge, Inc.

There being no seizure of any property or rights to property of the Remmers by virtue of the levy by the United States on June 1, 1953, Cal-Neva Lodge, Inc. had nothing to surrender to the United States under Section 3710(a) and accordingly could not be made liable in its own person to the United States under Section 3710(b). (*Bank of Nevada v. United States* (C. A. 9th), 251 F. 2d 820.) It would be indeed anom-

alous to view as “property” subject to lien, funds of Cal-Neva Lodge, Inc. which never were within the Remmers’ reach to enjoy. (*United States v. Bess, supra.*)

V.

The Claim of the United States Against Cal-Neva Lodge, Inc., Under Section 3710(b) of the Internal Revenue Code of 1939 Is a Penalty and Must Be Disallowed Pursuant to the Provisions of Section 57j of the Bankruptcy Act.

“Debts owing to the United States . . . as a penalty or forfeiture shall not be allowed, except for the amount of pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.” Section 57j, Bankruptcy Act.

The purpose for the enactment of Section 57j was to limit as far as possible the losses to be sustained by general creditors of a bankrupt. (3 Collier on Bankruptcy, Section 57.22.) Participation in the estate is to be denied “to a creditor who has neither in some degree contributed to the distributable funds . . . nor has suffered a pecuniary loss by parting with something in money’s worth.” (2 Collier on Bankruptcy, Section 57.22 at p. 297.)

Section 57j was intended to exclude from participation in the assets of a bankrupt estate “the bulk of fines, penalties, and other financial sanctions whose function in no way differs from that of most criminal laws in that they neither compensate for a financial loss suffered by the estate nor open a source of revenue, but

merely regulate human behavior through the threat of financial retribution.” (3 Collier on Bankruptcy, Section 57.22 at p. 296.)

The levy made by the United States against Cal-Neva Lodge, Inc. under Section 3692 of the Internal Revenue Code of 1939 was not made for the purpose of securing the United States for an indebtedness owing to it by Cal-Neva Lodge, Inc., but was made for the purpose of seizing a claimed indebtedness owing to the United States by the Remmers. Accordingly, insofar as the sums at issue are concerned, the United States contributed nothing to the distributable funds of Cal-Neva Lodge, Inc.

The United States suffered no loss by parting with something in money’s worth to Cal-Neva Lodge, Inc. Cal-Neva Lodge, Inc. did not cause the United States to be deprived of its recovery rights by its transfer of the Cal-Neva Lodge property to Park Lake Enterprises, Inc. The transfer of said property was made with the express assumption of the secured obligation to the Remmers by Park Lake Enterprises, Inc. The right of the Remmers in and to the Cal-Neva Lodge property continued in existence. In fact, the United States has proceeded against Park Lake Enterprises, Inc. to recover the Remmer interest.

By its very terms, Section 3710(b) is denominated as a “Penalty for Violation.” “Statutes generally refrain from calling the sanction for non-payment a fine or penalty, because if they do not take that precaution but call a penalty a ‘penalty’ they expose their claim to prompt disallowance.” 3 Collier on Bankruptcy, Section 57.22 at p. 301; *District of Columbia v. Greenbaum*, 223 F. 2d 633.

In attempting to proceed against Cal-Neva Lodge, Inc. under Section 3710(b), the United States is seeking to impose a personal liability upon Cal-Neva Lodge, Inc. for its failure to respond to the levy under Section 3692 of the Internal Revenue Act of 1939. (*Sims v. United States*, 79 S. Ct. 641.) A recovery against Cal-Neva Lodge, Inc. under Section 3710(b) would not limit the right of the United States to still pursue the Remmers for the collection of the tax indebtedness which was the subject of the initial levy against Cal-Neva Lodge, Inc. under Section 3692. (*United States v. Peoples State Bank* (D. C.), 53-2 U. S. T. C., Par. 9655.)

In *United States v. Peoples State Bank*, *supra*, the court stated as follows:

“The checking account of a delinquent income taxpayer in a local bank was subject to distraint under 1939 Code Section 3710(a). By its failure to pay the collector the amount levied against it within five days of the date of the final notice and demand, the bank became personally liable for this amount, plus interest thereon, notwithstanding the continuing liability of the taxpayer for an equivalent amount, pursuant to Section 3710(b).”

It can be seen that the claim asserted by the United States against Cal-Neva Lodge, Inc., under Section 3710(b) is not based upon a contribution rendered to the assets of Cal-Neva Lodge, Inc. but rather is one, that has for its purpose, the regulation of human behavior through the threat of financial retribution. Accordingly, the claim of the United States falls within the bar of Section 57j of the Bankruptcy Act and must be disallowed.

Conclusion.

Wherefore, Appellant prays:

1. That the Order of the District Court, dated June 27, 1960, sustaining the levy of the United States of June 1, 1953 be reversed.
2. That the Order of the Referee, dated April 18, 1959, be affirmed.
3. That Appellant recover of Appellee its costs on appeal.

Respectfully submitted,

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No. 17,046

IN THE
United States Court of Appeals
For the Ninth Circuit

CAL-NEVA LODGE, INC., a Nevada
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Order of the United States District Court
for the District of Nevada

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Order of the United States District Court
for the District of Nevada**

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion and order of the District Court (R. 34-46) are reported at 186 F. Supp. 187.

JURISDICTION

This action involves the allowability of a claim of the United States against Cal-Neva Lodge, Inc., for failure to honor a levy. On June 1, 1953, the United

States levied upon all property in possession of Cal-Neva Lodge, Inc., belonging to Elmer and Helen Remmer, for taxes owed by the Remmers to the United States. Cal-Neva Lodge, Inc., made no payment to the United States pursuant to the levy. (R. 32.) On November 12, 1955, Cal-Neva Lodge, Inc., instituted the instant proceedings under Chapter XI of the Bankruptcy Act. (R. 29.) On December 27, 1955, the District Director filed proof of claim in these proceedings setting forth a priority claim against Cal-Neva Lodge, Inc., in a sum equal to the value of the property not surrendered. (R. 7-8, 11, 17.) On April 18, 1959, the referee in bankruptcy entered an order disallowing this claim. (R. 28-33.) On May 26, 1959, the United States filed a petition for review of the order of the referee. (R. 26-27, 35.) On June 27, 1960, the District Court set aside the order of the referee and allowed the claim as a priority claim. (R. 45-46.) The case is brought to this Court by a notice of appeal filed by Cal-Neva Lodge, Inc., on July 26, 1960. (R. 46.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291, and the Bankruptcy Act, Section 24.

QUESTIONS PRESENTED

1. Whether the District Court correctly held that the levy of the United States effectively seized the secured obligation owed by the debtor to the Remmers so that the debtor in failing to honor the levy became personally liable to the United States under Section

3710(b) of the 1939 Code in the amount of the indebtedness.

2. Whether the District Court properly held that the claim of the United States under Section 3710(b) is for the collection of a pecuniary loss rather than a penalty to be disallowed under Section 57(j) of the Bankruptcy Act.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

STATEMENT

The facts, as found by the referee (R. 29-32) and adopted by the District Court (R. 36-38), are as follows:

On December 31, 1948, Cal-Neva Lodge, Inc., hereinafter referred to as the debtor, purchased the Cal-Neva Lodge, a property located in both the States of Nevada and California, from Elmer P. Remmer and Helen L. Remmer. The amount of the purchase price remaining unpaid on the Cal-Neva Lodge property was evidenced by a note executed by the debtor to the Remmers. The note provided for interest at the rate of 4% per annum. The note was secured by a purchase money first deed of trust executed by the debtor to the Remmers. (R. 31.)

Subsequently, the Remmers became involved in tax difficulties with the United States. Thereafter, on

June 1, 1953, the United States, pursuant to Section 3692 of the Internal Revenue Code of 1939, levied upon the secured obligation of the debtor which was owing to the Remmers.¹ At the time of the levy, the debtor owed the Remmers \$198,333.34, plus accrued interest at 4% from December 31, 1948. The indebtedness was not subject to any attachment or execution under judicial process at the time of the levy. (R. 31-32, 36-37.)

After the levy, the debtor sold the Cal-Neva Lodge property to Park Lake Enterprises, Inc., which agreed to assume the secured obligation to the Remmers. (R. 38.) No payment has been made by the debtor to the United States pursuant to the levy. (R. 32.)

On November 12, 1955, the debtor instituted proceedings under Chapter XI of the Bankruptcy Act. The United States filed a proof of claim on December 27, 1955, setting forth a priority claim as a result of its levy on the secured obligation owing by the debtor to the Remmers.² (R. 29-30.) The referee disallowed

¹The levy, Treasury Form 668-A as revised in November, 1953, actually notified the debtor "that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax * * *."

²In its proof of claim, the United States also set forth claims for certain corporate income, withholding, F.I.C.A. and F.U.T.A. taxes which had been assessed against the debtor. (R. 3-18.) The parties stipulated that the portion of the claim relating to withholding and F.I.C.A. taxes for the fourth quarter of 1955 in the sum of \$16,317.33, additional withholding and F.I.C.A. taxes for the third quarter of 1955 in the sum of \$736.57, and F.U.T.A. taxes for the year 1955 in the sum of \$2,434.98 should be allowed.

this claim as invalid on the ground that under California and Nevada law, the Remmers themselves could not claim any liability on the note but are required to look to the security first for payment. (R. 22-25.) On petition for review of the referee's order filed by the United States, the District Court reversed the referee's order and held the United States has a priority claim under Section 64 of the Bankruptcy Act, stating that collection of federal taxes is governed by federal law and that under federal law, the levy on the secured obligation in favor of the Remmers was completely effectual. (R. 34-46.) The District Court further held that the claim should not be disallowed as a penalty.

SUMMARY OF ARGUMENT

Sections 3670, 3690, 3692 and 3710 of the Internal Revenue Code of 1939 provide that if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property, whether real or personal; that if the taxpayer neglects or refuses to pay the tax after notice and demand is made upon him, the Government may levy upon all property or rights to property belonging to the taxpayer or on

(R. 30, 16.) The United States abandoned its claim for the corporate income taxes after it had filed a petition for review of the referee's order by filing an amended claim eliminating all claims for income taxes and penalties and interest thereon. (R. 36.) Thus the only matter in controversy in the District Court and in this Court relates to the amount claimed as the result of the levy of June 1, 1953, on the secured obligation owed by the debtor to the Remmers.

which there is a lien; that the person who is in possession of property which is subject to levy shall, upon demand, surrender such property to the Government and, if such person fails or refuses to do so, he is liable in his own person or estate to the United States in a sum equal to the value of the property (not to exceed the amount of the taxes for the collection of which the levy has been made).

In the instant case, on June 1, 1953, the United States, pursuant to Section 3692, levied upon property owed by the debtor to Elmer and Helen Remmer, for taxes due and owing by the Remmers to the United States. The debtor did not honor the levy. Accordingly, the debtor is personally liable to the United States under Section 3710(b) of the 1939 Code in a sum equal to the value of the property not surrendered unless it can show (1) that it was not in possession of property of the taxpayer which was subject to levy or (2) that the property was subject to a prior judicial attachment or execution. The statute admits of no other defenses. Neither of these defenses, however, is available to the debtor in the instant case as the undisputed facts of record show.

There is no question that the debtor was indebted to the Remmers at the time of the levy and that this indebtedness was not subject to any attachment or execution under any judicial process at the time of the levy. There is also no question that this indebtedness was secured by property which was in the debtor's possession and which it was using at the time of the levy. Nor is there any question that the indebtedness

and the security qualify as "property" or "rights to property" within the meaning of the foregoing Code sections, against which a lien may attach and a levy may be made.

The debtor, nevertheless, contends that under California law the only remedy available to the Remmers in collecting on the indebtedness owing to them was judicial foreclosure; that the United States, by its levy of June 1, 1953, is in the same position as the Remmers and possessed of the same rights had by the Remmers under state law; and that, accordingly, the United States had one form of action available to it—namely, judicial foreclosure—and it seized nothing by the levy. This argument—that the Remmers could not maintain an *in personam* action on the note—does not establish, however, that the debtor had no property or rights to property belonging to the Remmers. Rather, it ignores the plain facts of record, which establish beyond question that it had both liability and property belonging to the Remmers which the levy could reach. The particular California procedural requirements for enforcing the debtor's liability and the interest of the Remmers in the property cannot detract from the plain actuality that such liability and such property and rights were in fact and in law in debtor's possession and could be reached by the levy.

If there are sufficient interests existing under state law to qualify as "property" or "rights to property" within the meaning of the Code, state law is inoperative to prevent the United States from levying effectively on such "property" or "rights to property."

The courts have uniformly recognized this principle. The District Court properly noted and gave effect to it.

Since, in the instant case, the debtor had liability owing to and property interest belonging to the Remmers at the time of the levy which were "property" or "rights to property" within the meaning of the pertinent sections of the Internal Revenue Code against which a lien could attach and a levy could be made, the levy of June 1, 1953, was effective to seize such property or right to property regardless of any provisions of state law to the contrary. After the levy and the failure of the debtor to surrender the property or the rights to property in its possession, the procedure for enforcement of these rights arising in favor of the United States as a result of the failure to honor the levy is a matter of federal law. The federal statute imposes a liability upon the debtor to the United States of a sum equal to the value of the property or rights not surrendered.

Thus, clearly, the debtor is personally liable to the United States for its failure to honor the levy of June 1, 1953, pursuant to the provisions of Section 3710(b). Under Section 64(a)(5) of the Bankruptcy Act the claim of the United States is a priority claim.

Further, the claim of the United States herein is not barred by Section 57(j) of the Bankruptcy Act, as the District Court correctly held. As shown by the legislative history and the decided cases, the clear purpose of Section 3710(b) is not to punish but rather is to secure collection of property in the hands of a

third person which belongs to a taxpayer indebted to the United States. Thus, a claim under Section 3710(b) is pecuniary, not penal, and is collectible in a bankruptcy proceeding.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT THE DEBTOR IN FAILING TO HONOR THE LEVY OF THE UNITED STATES UPON A SECURED OBLIGATION OWED BY IT TO THE REMMERS BECAME PERSONALLY LIABLE TO THE UNITED STATES UNDER SECTION 3710(b) OF THE 1939 CODE IN THE AMOUNT OF THE SECURED OBLIGATION SO THAT THE CLAIM OF THE UNITED STATES FOR THIS AMOUNT IS A PRIORITY CLAIM UNDER SECTION 64 OF THE BANKRUPTCY ACT

The lien for federal taxes, and the provisions for the collection thereof, are strictly federal and strictly statutory. *Bank of Nevada v. United States*, 251 F.2d 820, 824 (C.A. 9th), certiorari denied, 356 U.S. 938; *United States v. Christensen*, 269 F.2d 624, 637 (C.A. 9th). As this Court pointed out in the *Bank of Nevada* case (p. 821), "No government worthy of its name will permit itself to be rendered incapable of collecting the public fisc."

The Internal Revenue Code of 1939 provides that, if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Section 3670 of the Internal Revenue Code of 1939, Appendix, *infra*. If

the person who is liable to pay the tax neglects or refuses to do so within ten days after notice and demand is made upon him, the Secretary (of the Treasury) or his delegate may collect such tax by levy upon all property and rights to property (with certain exceptions not pertinent here) belonging to such person or on which there is a lien. Sections 3690 and 3692 of the Internal Revenue Code of 1939, Appendix, *infra*. Upon such a levy, any person who is in possession of property or rights to property which are subject to the levy shall, upon demand, surrender such property or rights to the Secretary or his delegate, unless the property is, at the time of demand, subject to an attachment or execution under any judicial process. Any person who, upon demand, fails or refuses to surrender property or rights to property which is subject to levy is liable in his own person or estate to the United States in a sum equal to the value of the property not surrendered (not to exceed the amount of the taxes for the collection of which the levy has been made) together with costs and statutory interest from the date of levy. Section 3710(a) and (b) of the Internal Revenue Code of 1939, Appendix, *infra*.

In the instant case, the United States, pursuant to Section 3692, levied upon property owed by the debtor to Elmer and Helen Remmer, for taxes owed by the Remmers to the United States. (R. 31-32.)³ The debtor did not honor the levy. Accordingly, it is

³The Commissioner had assessed deficiencies, interest and penalties against the Remmers in an amount exceeding \$800,000. See *Remmer v. United States*, 205 F.2d 277.

personally liable to the United States under Section 3710(b) of the 1939 Code in a sum equal to the value of the property not surrendered. The claim of the United States here is for this indebtedness to it.⁴

The terms of Section 3710(a) of the Internal Revenue Code of 1939 permit the debtor only two defenses by which it can avoid personal liability for failing to honor a levy: (1) That it was not in possession of property of the taxpayer which was subject to levy, or (2) that the property was subject to a prior judicial attachment or execution. The statute admits of no other defenses. *Bank of Nevada v. United States*, *supra*; *United States v. Manufacturers Trust Co.*, 198 F.2d 366 (C.A. 2d); *Commonwealth Bank v. United States*, 115 F.2d 327 (C.A. 6th). Neither of these defenses is available to the debtor in the instant case as the undisputed facts of record show.

The referee found as facts (R. 32):

That at the time of said levy, Cal Neva Lodge, Inc., was indebted to the Remmers in the amount

⁴As noted, *supra*, the debtor, subsequent to the levy, transferred the Cal-Neva Lodge property to Park Lake Enterprises, Inc., and the latter assumed the obligation to the Remmers. The United States thereupon served a notice of levy on Park Lake in order to collect the taxes owed by the Remmers; this notice of levy was also not honored. Action is now pending against Park Lake in the United States District Court for the District of Nevada for a sum equal to the value of the property not surrendered, pursuant to Section 3710(b) of the 1939 Code. It has at all times been understood in these cases that the Government does not seek to collect the value of the indebtedness more than once. (R. 43.) The Government is simply protecting its interest in collecting one time by proceeding against both the debtor and Park Lake. Amounts collected from either will be applied to reducing the liability of both as well as the liability of the Remmers. I.T. 2577, X-I Cum. Bull. 300 (1931).

of \$198,333.34, plus accrued interest at 4% from December 31, 1948, which was evidenced and secured by the promissory note and deed of trust referred to in paragraph V. Said indebtedness was not subject to any attachment or execution under any judicial process at the time of the levy.

These findings were approved by the District Court (R. 37) where apparently they were not challenged, and they are not challenged here. Thus, there is no question that the debtor, Cal-Neva Lodge, Inc., was indebted to the Remmers at the time of the levy. Further, as the District Court pointed out, the obligation was due at that time. (R. 44.)

The question of whether this secured obligation qualifies as "property" or "rights to property" within the meaning of the Code sections discussed *supra* is a federal question. *Fidelity & Deposit Co. v. New York City Housing Authority*, 241 F.2d 142 (C.A. 2d). The courts have given the words "property" or "rights to property", as used in these statutory provisions, broad meanings. They are held to include obligations, debts owing to the taxpayer, and other intangibles. *United States v. Eiland*, 223 F.2d 118 (C.A. 4th); *United States v. Graham*, 96 F. Supp. 318 (S.D. Calif.), affirmed *sub nom. State of California v United States*, 195 F.2d 530 (C.A. 9th), certiorari denied, 344 U.S. 831. As the Fourth Circuit stated in the *Eiland* case (p. 121):

There can be no question, we think, but that the lien for taxes provided by the statute can be asserted against intangible property such as a

debt. [Citing many cases.] And we think it equally clear that the proper way to assert the lien is by levy and notice such as was served here. * * *

Accord: *Bank of Nevada v. United States, supra*; *In the Matter of Cherry Valley Homes, Inc.*, 255 F.2d 706 (C.A. 3d), certiorari denied, 358 U.S. 864. Thus, it is clear that the debt owing to the Remmers is "property" or "rights to property" against which a lien may attach and a levy may be made, under the statutes here involved.

The debtor, nevertheless, contends that it was not in possession of any property of the Remmers which was subject to levy on June 1, 1953. (Br. 7-10.) Its argument is that under California law the only remedy available to the Remmers in collecting on the indebtedness owing to them was judicial foreclosure;⁵ that the United States, by its levy of June 1, 1953, is in the

⁵The provisions cited by the debtor (Sections 580(b) and 726 of the California Code of Civil Procedure) were enacted to prevent creditors from bidding in the debtor's real property at a nominal figure and then also holding the debtor personally liable for a large proportion of the debt. *Hatch v. Security First National Bank*, 19 Cal.2d 254, 259; 22 Cal. L.R. 170, 180. These sections presuppose the existence of a debt and pertain simply to the remedies of the creditor in the event of default.

Moreover, the property was only in part located in California; in part it was located in Nevada (R. 31) and thus since Nevada was to some extent the place of performance of debtor's obligation under the note and trust deed, Nevada law would apply. No provision of Nevada law similar to Section 580(b) of the California Code of Civil Procedure is invoked by the debtor nor has come to our attention which would deny a deficiency recovery in the case of a purchase money transaction. However, for the reasons stated in the body of the argument these provisions of state law are irrelevant in the face of the rights created in favor of the Government under Section 3710.

same position as the Remmers and possessed of the same rights had by the Remmers under state law; and that, accordingly, the United States had one form of action available to it—namely, judicial foreclosure—and it seized nothing by the levy. This argument—that the Remmers could not maintain an *in personam* action on the note—does not establish, however, that the debtor had no property or rights to property belonging to the Remmers. Rather, it ignores the plain facts of record. The record establishes that at the time of the levy the debtor had in its possession and was using in its business the Cal-Neva Lodge property. The record further establishes that the Remmers had an interest in this property to the value of and which secured the indebtedness owing to them by the debtor. Thus, quite clearly, the debtor was in possession at the time of the levy of property or a property interest belonging to the Remmers, which debtor failed to surrender. This property interest was seized by the levy of the United States which was on “*all property, rights to property * * * now in your possession and belonging to the * * * [Remmers].*” (Emphasis supplied.)⁶ The debtor failed to turn over that property or to pay over the indebtedness; instead, it proceeded to occupy, use and enjoy the property after the levy, and eventually sold the property to Park Lake Enterprises. In doing so, however, it did not, and could not, defeat the levy of the United States. Debtor cannot take the position in the face of the levy of asserting that despite its note and the trust deed and its posses-

⁶See, fn. 1, *supra*.

sion and control of the valuable property securing its debt, it had neither liability nor property belonging to the Remmers which the levy could reach. The particular California procedural requirements for enforcing the debtor's liability and the interest of the Remmers in the property cannot detract from the plain actuality that such liability and such property and rights were in fact and in law in debtor's possession and could be reached by the levy.

The remedy afforded the Government by Section 3710(b) is significant and would appear intended to protect the Government against a position such as that which debtor here asserts. Section 3710(b) provides, as noted, that any person who fails to honor a levy is liable "in a sum *equal to* the value of the property or rights not so surrendered". (Emphasis supplied.) The debtor having held this property and rights to property belonging to the Remmers at the time of the levy is liable to the United States in a sum equal to the value of the Remmers' interest therein (the amount of the indebtedness) for failing to turn the property or the money owed over to the United States pursuant to the levy.

If there are sufficient interests existing under state law to qualify as "property" or "rights to property" within the meaning of the Code, state law is inoperative to prevent the United States from levying effectively on such "property" or "rights to property". The courts have uniformly recognized this principle.⁷

⁷The debtor does not cite any cases which hold to the contrary. *United States v. Winnett*, 165 F.2d 149 (C.A. 9th), and *United*

The District Court properly noted and gave effect to it.

The Supreme Court expressly recognized this principle in *United States v. Bess*, 357 U.S. 51. The Court therein rejected the argument that since under state law the cash surrender value of life insurance policies is not subject to creditor's liens, whether asserted by a private creditor or by a state agency, the federal liens could not attach to the cash surrender value of such policies. The Court held that the federal liens attached, stating (pp. 56-57):

However, once it has been determined that state law creates sufficient interests in the insured to satisfy the requirements of Section 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States.

In like manner, in *Bank of Nevada v. United States*, *supra*, this Court rejected the bank's contention that it did not have in its possession "property" or "rights to property" subject to levy. The bank argued that under state law it had a general lien or right of set-off against the deposits of the depositor; that it had a right of set-off also by virtue of an agreement with the taxpayer-depositor and its right of set-off depleted the funds levied upon. This Court stated (pp. 709-713):

States v. Graham, 96 F. Supp. 318 (S.D. Calif.), affirmed *sub nom. State of California v. United States*, 195 F.2d 530 (C.A. 9th), certiorari denied, 344 U.S. 831, upon which it relies principally, simply hold that the Government cannot seize by its levy property in excess of that owed to the creditor at the time of the levy. See *Bank of Nevada v. United States*, *supra*, p. 713.

The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly *Federal* and strictly *statutory*. Those provisions are unaffected by any alleged "general rule" that a bank has a "general lien" upon deposits.

* * * * *

No strained theories of setoff, relation back, or the like can frustrate the sovereign from collecting its taxes in this case. The stubborn principle remains, under the facts of this case, that the appellant is liable for failing to surrender, after levy and demand, the bank account to which the liens had attached.

Similarly, in *United States v. Manufacturers Trust Co.*, 198 F.2d 366 (C.A. 2d), the bank's assertion that it was not liable for failing to honor a levy on a savings account was held to be without merit. The bank relied upon state law in support of its position that the relationship between it and the depositor-taxpayer was that of debtor-creditor and that under state law it was not obliged to make payments out of the savings account except in conformity with the contract which created that relationship. The contract required the presentation of the depositor's pass-book upon request for payments which the United States did not do. Thus, the bank argued, as the debtor in the case at bar and the bank in the *Bank of Nevada* case, that the distraint had no more effect than to put the United States in the position of the creditor *vis-a-vis* the debtor in accordance with state law. The Court rejected this contention stating (p. 368):

However, the remedy of the government to enforce collection of taxes by the summary administrative method of distraint is not so limited in its effect and is a special privilege it has which is analogous to, but in addition to, garnishment and other remedies of an ordinary creditor. (citing cases) It is a constitutionally valid expedient for the collection of taxes necessary to the very existence of government (citing cases) and has been available by law since 1791. In 1926 this remedy of the government was extended in the statutes above mentioned to permit the seizure of the property of a taxpayer in the hands of a third party * * *.

Also, *In the Matter of Cherry Valley Homes, Inc., supra*, the argument that the United States upon levying on an indebtedness was in no better position than the creditor with respect to collecting the indebtedness was held to be meritless. In the *Cherry Valley Homes* case, the United States levied on an indebtedness owing by Cherry Valley Homes, Inc. (Cherry Valley), to the M. Tobin Company (Tobin). Cherry Valley failed to honor the levy. Subsequently, Cherry Valley filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act and the United States filed a proof of claim for a sum equal to the amount which Cherry Valley had failed to surrender pursuant to the notice of levy. The referee with the approval of the District Court (1 A.F.T.R.2d 989) held that the claim of the United States was not a priority claim since if the Government had not levied upon the debt, Tobin would have shared pro-rata with

other unsecured creditors of Cherry Valley in the assets available for unsecured creditors. The Third Circuit reversed, holding that the United States had a priority claim. The court said (pp. 707-708):

In legal contemplation and consequence, this levy effectively and exclusively appropriated the debt to the satisfaction of the tax claim six months before the Chapter X proceeding was instituted. [Citing cases.] Such a levy is treated in law like a seizure of corporeal property, taken into the possession of a collector by way of distraint for taxes. * * *

Alternatively, as the government urges here, since the possessory concept of "seizure" is not strictly applicable to a debt, it seems correct to say that the tax levy through process served upon the debtor at least accomplished an assignment of the Tobin's claim against Cherry Valley to the United States by operation of law. This approach brings into decisive effect the provision of Revised Statutes, Section 3466, 31 U.S.C. Sec. 191, that "when- ever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." * * *

Finally, it is argued in a general way that there is some lack of equity in the priority thus accorded the government. But we see no inequity in recognizing that the government acquired a priority over general creditors when its claim was asserted and perfected against the debt owed by Cherry Valley many months before Chapter X proceedings were instituted.

In the instant case, as we have shown, the debtor had liability owing to and property interest belonging

to the Remmers at the time of the levy which were "property" or "rights to property" within the meaning of the pertinent sections of the Internal Revenue Code against which a lien could attach and a levy could be made. Accordingly, the levy of June 1, 1953, was, as the decided cases show, effective to seize such property or rights to property regardless of any provisions of state law. After the levy and the failure of the debtor to surrender the property or the rights to property in its possession, the procedure for enforcement of these rights arising in favor of the United States as a result of the failure to honor the levy is a matter of federal law. The federal statute imposes a liability upon the debtor to the United States of a sum equal to the value of the property or rights not surrendered. *Bank of Nevada v. United States, supra*.

Thus, clearly, the debtor, pursuant to the provisions of Section 3710(b), is personally liable to the United States for its failure to honor the levy of June 1, 1953. Under Section 64(a)(5) (11 U.S.C. 1952 ed., Sec. 104) of the Bankruptcy Act, Appendix, *infra*, the claim of the United States is a priority claim. The District Court was clearly correct in so holding and should be affirmed.

II

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CLAIM OF THE UNITED STATES UNDER SECTION 3710(b) IS FOR THE COLLECTION OF A PECUNIARY LOSS AND IS NOT A PENALTY TO BE DISALLOWED UNDER SECTION 57(j) OF THE BANKRUPTCY ACT

The debtor further raises on appeal the question of whether Section 3710(b) imposes a penalty or provides for the collection by the United States of a pecuniary loss. The debtor claims it imposes a penalty and that accordingly the claim of the United States herein is barred by Section 57(j) of the Bankruptcy Act, Appendix, *infra*. We submit that the clear purpose of Section 3710(b), as shown by the legislative history and the decided cases, is not to punish but rather is to secure collection of property in the hands of a third person which belongs to a taxpayer indebted to the United States. Thus, a claim under Section 3710(b) is pecuniary, not penal, and is collectible in a bankruptcy proceeding.

Section 3710(b) was originally enacted as Section 1114(e) of the Revenue Act of 1926, C. 27, 44 Stat. 9. In its report, S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum. Bull. (Part 2) 332, 360), the Senate Committee on Finance in explanation of the proposed liability to be created by Section 1114(e) said that it is "a liability similar to that of an executor who pays debts before he pays a debt due the United States". Thus, personal liability arises when all of the funds belonging to the taxpayer coming into the possession of the person levied upon are expended by the latter to satisfy debts other than those due to the

United States. As stated in I.T. 2577, X-1 Cum. Bull. 300, 301 (1931), "In short, the statute does not create a dual monetary liability existent at one and the same time".

In the light of the legislative history, the Revenue Service ruled in I.T. 2577, *supra*, that money collected from a bank in a suit under Section 1114(e) was not to be treated as a penalty but was to be credited against the tax liability of the taxpayer to whom the bank was indebted. As stated, footnote 4, *supra*, any amount collected herein from the debtor will be applied to reducing the tax liability of the Remmers.

The decided cases have made it clear that Section 3710(b) does not impose a penalty. This Court quoted with approval in *Bank of Nevada v. United States*, *supra*, p. 828, the observation of the Fourth Circuit in *United States v. Eiland*, *supra*, pp. 121-122, that " * * * payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt. [Cases cited.]" The Second Circuit in *United States v. Metropolitan Life Insurance Co.*, 130 F.2d 149, 151, said:

It is true that this action was called a "penalty," but it was really not that, for title would undoubtedly pass upon payment so that the holder would suffer no loss.

Thus, the courts have recognized that the personal liability provided in Section 3710(b) is merely a collection of the original amount owing from the person levied upon to the taxpayer. The fact that this provi-

sion is in the guise of a penalty, being entitled "Penalty for violation", is not controlling; it is the actual purpose and operation of the statute which governs. See also *In re Haynes*, 88 F. Supp. 379 (Kans.).

For these reasons, we submit that the District Court was quite correct in devoting "but little time to the 'penalty' issue so earnestly raised by the debtor". (R. 40.) The claim of the United States is clearly allowable. See also, *Simonson v. Granquist* (C.A. 9th), decided February 1, 1961 (1961-1 U.S.T.C., par. 9226), petition for rehearing pending, and *United States v. Harris* (C.A. 9th), decided February 1, 1961 (1961-1 U.S.T.C. par. 9227), petition for rehearing pending.

CONCLUSION

The order of the District Court is correct and should be affirmed.

Respectfully submitted,

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(Appendix Follows.)



Appendix.



Appendix

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid

(26 U.S.C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

* * * * *

26 U.S.C. 1952 ed., Sec. 3710.)

Bankruptcy Act, c. 541, 30 Stat. 544:

SEC. 57 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 14, Act of July 7, 1952, c. 579, 66 Stat. 420]. *Proof and Allowance of Claims.*—

* * * * *

(j) Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

* * * * *

(11 U.S.C. 1958 ed., Sec. 93.)

SEC. 64. [As amended by Sec. 1, Act of June 22, 1938, *supra*]. Debts Which Have Priority.—

a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * the costs and expenses of administration, * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be

heard and determined by the court; and (5) debts owing to any person including the United States, who by the laws of the United States in [sic] entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: * * *.

* * * * *

(11 U.S.C. 1958 ed., Sec. 104.)

No. 17046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CAL-NEVA LODGE, INC., a Nevada corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT CAL-NEVA LODGE, INC.

AARON LEVINSON,
9363 Wilshire Boulevard,
Beverly Hills, California,

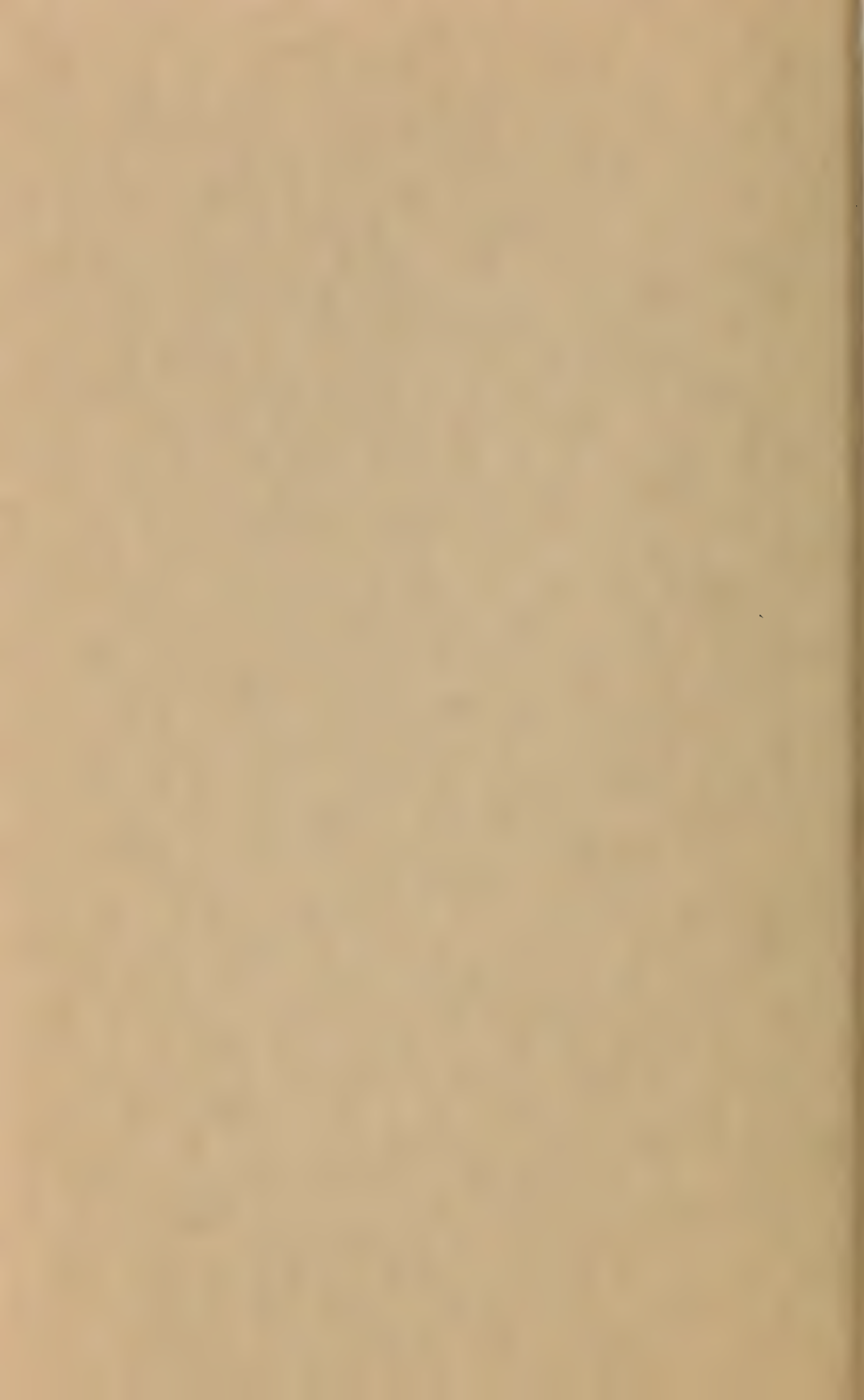
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Reno, Nevada,

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639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellant.

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FRANK H. SCHMID, CLERK



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No. 17046

IN THE

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CAL-NEVA LODGE, INC., a Nevada corporation,

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vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT CAL-NEVA LODGE, INC.

I.

**Appellant Was Not in Possession of Any Property
or Rights to Property of the Tax Debtor as of
June 1, 1953, the Date of Levy.**

“The threshold question, in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had ‘property’ or ‘rights to property’ to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the ‘property’ sought to be reached by the statute.”

Aquilino v. United States, 80 S. Ct. 1277, 1280;
United States v. Durham Lumber Company, 80
S. Ct. 1282.

Apparently, the United States first agrees that state law determines the nature and extent of the “property” and “rights to property” to which its tax liens attach (U. S. Br. 7), though it fails to indicate any appropriate state court decisions either defining the property interests assertedly held by Appellant as of June 1, 1953 or contradicting the authorities cited by Appellant. Then, rather inconsistently, the United States seems to argue that Section 3710 of the Internal Revenue Act of 1939 creates those rights to which its lien attaches. (U. S. Br. 13, footnote 5.)

Neither Section 3692 nor Section 3710 of the Internal Revenue Act of 1939 creates property rights. Said sections merely attach federally defined consequences to rights created under state law. *Aquilino v. United States*, *supra*; *United States v. Durham Lumber Company*, *supra*.

The transaction between Appellant and the Remmers, having been made in California and being of the purchase money variety [Tr. of R. 31] precluded any debtor-creditor relationship between the parties, Section 580(b), California Code of Civil Procedure, and left the Remmers with a security interest only in the land to the extent of the unpaid balance. *Jeanese v. Surety Title and Guaranty Co.*, 176 Cal. App. 2d 449.

While the United States indicates that provisions of state law are irrelevant to a determination of the instant controversy (U. S. Br. 13, footnote 5), it argues, should state law be considered, that since a part of the Cal-Neva Lodge was located in Nevada, Nevada became the place of performance and that therefore its law must be held to govern the nature of the “proper-

ty” or “rights to property” of the Remmers held by Appellant on June 1, 1953. (U. S. Br. 13, footnote 5.)

The agreement between Appellant and the Remmers for the purchase of the Cal-Neva Lodge was entered into in the State of California. [Tr. of R. 31.] Further, a part of the Cal-Neva Lodge was located in the state of California. [Tr. of R. 31.] Whether Appellant was indebted to the Remmers as of June 1, 1953 is a matter of contractual interpretation as implemented by legislative enactment and does not in any manner involve the question of the validity of the Remmer deed of trust. Where a trust deed is utilized to secure a note obligation, borrower and lender impliedly contract that the land will constitute the primary fund to secure the debt and that a valid sale under the deed of trust must first be accomplished before any action can be maintained on the note. *Bank of Italy v. Bentley*, 217 Cal. 644.

“Questions relating distinctively and directly to the mortgage as distinguished from the personal obligation are to be referred to the Lex Rei Sitae as such, while those that relate primarily and distinctively to the personal obligation and only indirectly affect the mortgage may be governed by another law.” 11 Am. Jur., Section 39. “It is a familiar rule that the construction and validity of the contract is governed by the rule of the place where it was made. . . .” 11 Am. Jur., Section 117. It would follow therefore that California law must determine what, if any, “property” or “rights to property” of the Remmers were held by Appellant on June 1, 1953.

Assuming, *arguendo*, that Nevada law controls in determining the nature of the "property" or "rights to property" held by Appellant on June 1, 1953, it should be noted that Nevada has a statute (Nevada Revised Statutes 40.430) providing for judicial foreclosure as a condition precedent to the granting of a deficiency judgment, *Walker v. Shrakes*, 339 P. 2d 124; *Nevada-Douglas Consolidated Copper Co. v. Berryhill*, 75 P. 2d 992, which said statute was copied from Section 726 of the California Code of Civil Procedure. VII American Law of Property, Section 16.201, footnote 1. Due to the scarcity of reported Nevada decisions, California authorities interpreting Section 726, California Code of Civil Procedure, would appear to be helpful in determining the force and effect of N. R. S. 40.430.

Section 726, California Code of Civil Procedure, constitutes an expression of the public policy of the state of California and accordingly, the provisions thereof may not be waived in advance by agreement between borrower and lender. *Winklemen v. Sides*, 31 Cal. App. 2d 387. The provisions of Section 726, California Code of Civil Procedure, may not be circumvented by a beneficiary of a trust deed through the device of his waiving his security and proceeding independently on the debt. *Western Fuel Co. v. Lewald*, 190 Cal. 25.

In *Meyer v. Weber*, 133 Cal. 681, the Supreme Court of the state of California, in describing the relationship between borrower and lender as affected by Section 726, California Code of Civil Procedure, stated at pages 684-685 as follows:

"Whatever the sum of the debt, the mortgagor can be legally compelled to pay no part of it until the decree is entered for the sale of the premises

mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the Sheriff's return. The liability is therefore contingent and dependent upon the fact whether upon the sale of the mortgaged premises there shall be a deficiency."

In *Birkhofer v. Krumm*, 4 Cal. App. 2d 43, the court was confronted with a situation somewhat similar to that present in the instant case. Grigsby borrowed money from Attwood and secured the obligation with a trust deed on certain real property. Thereafter Grigsby conveyed the real property subject to the trust deed to Krumm who agreed to assume the Attwood obligation. In analyzing the relationship between Grigsby, the trustor-grantor, Krumm, the grantee, and the secured creditor in the context of Section 726, California Code of Civil Procedure, the court, at page 50, stated as follows:

"That the land furnishes the principal or primary fund for the payment of the mortgage debt; that as between the grantor and grantee, the grantee becomes the principal and the grantor the surety for the deficiency remaining after applying the money derived from the sale of the land on the debt; that from the point of view of the mortgagee both the grantor and the grantee stand in the relation of sureties for the payment of the deficiency to the mortgagee."

Notwithstanding the nature of Sections 726, California Code of Civil Procedure, and N. R. S. 40.430, and in spite of the fact that Section 580(b), California Code of Civil Procedure, precludes a debtor-creditor re-

lationship between borrower and lender in a purchase money situation, *Jeanese v. Surety Title and Guaranty Co.*, *supra*, the United States contends that the aforementioned statutes are procedural only. (U. S. Br. 13.) To support its contention the United States cites the case of *United States v. Manufacturers Trust Co.*, 198 F. 2d 366. (U. S. Br. 17.)

In *Manufacturers Trust Co.* the court held that in levying upon the account of its tax debtor in the hands of defendant bank, the United States was not barred from collecting the proceeds in said account by its failure to present the bank with its tax debtor's passbook. In so holding, the court, at page 369, described the bank's contractual right to have the passbook presented before making payment as ". . . but a banking convenience to facilitate the identification of persons who were presently entitled to withdraw from the account. . . ."

A fact situation similar to that present in *Manufacturers Trust Co.* was before the court in *United States v. Emigrant Industrial Savings Bank*, 122 Fed. Supp. 547. The court, though holding for the United States, stated at page 549-550 as follows:

"Conceivably a state statute might declare that to the extent that passbooks were not presented there should be no relation of debtor and creditor between bank and depositor. I think that that would affect the right itself and thus bind the government."

The attempt to equate the disregarding of the passbook requirement with the dispensing of the statutory protection accorded a debtor by Sections 580(b) and

726 of the California Code of Civil Procedure and N. R. S. Section 40.430 is unconscionable.

The United States points to the Referee's Finding of Fact VI to the effect that Appellant was indebted to the Remmers in the sum of \$198,333.34 as of June 1, 1953 as establishing a debtor—creditor relationship. (U. S. Br. 11-12.) However, the United States ignores the Referee's Findings of Fact V and VII relating to the purchase money trust deed given the Remmers and the failure of both the Remmers and the United States to exhaust the security of said trust deed. [Tr. of R. 31-32.]

Courts have recognized the ineffectiveness of a levy by the United States where the liability of the person levied upon to the tax debtor is contingent upon the performance of a prior condition as would be the case in Nevada in the absence of a judicial foreclosure and deficiency judgment under Section 40.430 N. R. S. *Meyer v. Weber, supra*.

In *United States v. Chapman* (C. A. 10), 281 F. 2d 862, the owner of the realty was in possession of funds payable to the tax debtor as prime contractor. The tax debtor had failed to pay various labor and material claimants. By contract between the owner and tax debtor, the owner was authorized to retain the balance of funds until such time as tax debtor could furnish the owner proof of payment of the labor and material claimants. Such proof was a condition precedent to the right of the tax debtor to receive the retained balance. The court held that the tax debtor, having failed to satisfy the condition precedent, had no enforceable right to collect the retained balance and that accordingly there was no "property" or "rights

to property" to which the tax lien of the United States attached.

In *United States v. Massachusetts Mutual Life Insurance Co.* (C. A. 1), 127 F. 2d 880, the contract between the insurance company and the tax debtor, as the insured, provided that the tax debtor would have to first surrender his insurance policy before he could recover the cash surrender value of same. The United States, in levying upon the insurance company for the cash surrender value, failed to surrender the policy of insurance. The court held that the United States seized nothing by its levy for the reason that it failed to surrender the insurance policy, which said surrender was a condition precedent to liability and not a mere formality which could be dispensed with. See also *City of New York v. United States* (C. A. 2), 283 F. 2d 829; *In re Halperin* (C. A. 2), 280 F. 2d 407.

In addition to and by virtue of the failure of the United States to satisfy the condition precedent of Section 40.430 N. R. S., the United States is confronted with a further problem in attempting to sustain its levy of June 1, 1953. If there was any liability owing by Appellant to the Remmers as of June 1, 1953, the precise amount of that liability was unascertained as of the date of levy. *Meyer v. Weber, supra*. In *United States v. Stockyards Bank of Louisville* (C. A. 6), 231 F. 2d 638, the government levied upon its tax debtor's interest in various United States savings bonds held by the defendant bank. The bonds in question were owned jointly by the tax debtor and his wife. The respective interests of the tax debtor and his wife in and to the bonds in question were unascertained as of the date of levy. In holding that the bank was not

liable to the United States under Section 3710(b) of the Internal Revenue Act of 1939, the court stated at page 631, as follows:

“Beyond showing that it was the delinquent tax payer who had left the bonds with the president of the appellee bank, the government adduced no evidence to establish the extent, if any, of his property interest in them. Proof of the actual value of the tax payer’s interest was an essential element of the government’s case under the statute, and for lack of such proof the case falls.”

In the Matter of Cherry Valley Homes, Inc., 255 F. 2d 706, cited by the United States (U. S. Br. 18, 19), is readily distinguishable from the instant controversy. In *Cherry Valley* there was no quarrel with the fact that the seizure by the United States found Cherry Valley in possession of an indebtedness owing to Tobin, the tax debtor. *Cherry Valley* merely stands for the proposition that while the debt owing to Tobin by Cherry Valley was not entitled to a bankruptcy priority, the appropriation of said debt by the United States converted the obligation of Cherry Valley into a claim entitled to priority in the subsequent bankruptcy of Cherry Valley.

The United States argues that in addition to its alleged indebtedness, Appellant was in possession of other “property” or “rights to property” of the Remmers as of June 1, 1953. (U. S. Br. 14.) It is correct that at the time of levy, Appellant had in its possession and was using in its business the Cal-Neva Lodge property. However, as of June 1, 1953 title to the Cal-Neva Lodge was in Appellant. [Tr. of R. p. 31.]

Accordingly, the Cal-Neva Lodge itself did not constitute "property" of the Remmers as of June 1, 1953.

The only things had by the Remmers which related to Appellant as of June 1, 1953, were the note and trust deed of December 31, 1948 [Tr. of R. 31], and a security interest in the land measured by the balance due as of June 1, 1953. *Jcanese v. Surety Title and Guaranty Co.*, *supra*.

Certainly the note and trust deed of December 31, 1948 were not property in the possession of Appellant as of June 1, 1953.

"... (I)t would be nonsense to say that a promissor is in 'possession' of a 'right to property' against himself, or that by performing he surrenders that right." *United States v. Metropolitan Life Insurance Co.* (C. A. 2), 130 F. 2d 149.

Assuming that Appellant could be said to have been in possession of the security interest of the Remmers in and to the Cal-Neva Lodge property as of June 1, 1953, can the Government seriously contend that it was the duty of Appellant to in some manner carve out approximately \$200,000.00 worth of the Cal-Neva Lodge and turn same over to the United States?

"Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear." *United States v. Stockyards Bank of Louisville*, *supra*, at page 631.

II.

The Claim of the United States Against Cal-Neva Lodge, Inc., Under Section 3710(b) of the Internal Revenue Code of 1939 Is a Penalty and Must Be Disallowed Pursuant to the Provisions of Section 57j of the Bankruptcy Act.

Appellant has heretofore argued that the imposition of liability against it under Section 3710(b) of the Internal Revenue Act of 1939 is penal and must fall pursuant to Section 57j of the Bankruptcy Act. (Op. Br. 10-12.) The United States, in its brief (U. S. Br. 22) cites *United States v. Eiland*, 223 F. 2d 118, as standing for the proposition that payment to the Government pursuant to levy and notice constitutes a complete defense to the debtor against any action brought against him on account of the debt. In *Eiland*, the payment to which the court refers is payment made pursuant to a levy under Section 3692 of the Internal Revenue Act of 1939. The instant claim asserted by the United States against Appellant is not based upon Section 3692, but, rather, is made under the provisions of Section 3710(b).

“Section 3710(b) is entirely a penal statute directed against persons who refuse to surrender property to the Collector as required by Section 3710(a), and accordingly no other parties are necessary to the suit. . . . The fact that the bank may be subject to double liability is no defense because Section 3710(a) permits only two defenses, to wit, that the said person is not in possession of property of the taxpayer which is subject to distraint, or that the property is subject to a prior

judicial attachment or execution." *United States v. Third National Bank & Trust Co.*, 111 Fed. Supp. 152, 156.

In *United States v. Stockyards Bank of Louisville*, *supra*, the court in describing the nature of an action under Section 3710(b), stated at page 630 as follows:

"... (T)he proceeding authorized is not an action in Rem, nor is it a suit for the collection of a tax. It is a suit to enforce personal liability for failure to surrender property belonging to a delinquent taxpayer."

See also *United States v. Massachusetts Mutual Life Insurance Co.*, *supra*, and *United States v. Aetna Life Insurance Co. of Hartford, Conn.*, 46 Fed. Supp. 30, to the effect that payment under Section 3710(b) constitutes no assurance to the person so paying that he will not be subject to a further action on the claimed indebtedness by the tax debtor to whom he was primarily indebted.

The cases of *Simonson v. Granquist* (C. A. 9), 1961-1 U. S. T. C. Par. 9226 and *United States v. Harris* (C. A. 9), 1961-1 U. S. T. C. Par. 9227 cited by the United States (U. S. Br. 23) are not in point in that they relate only to the allowance in bankruptcy of penalties on a non-penal lien claim of the United States. It is Appellant's contention that the claim of the United States involved herein is penal in its entirety.

The fact that the United States has chosen to apply any moneys which it may receive from Appellant or Park Lake Enterprises, Inc. to reduce the tax indebtedness of the Remmers (U. S. Br. 11, footnote 4, 22), can not be held to change the nature of Section 3710(b).

It is under this section that the United States asserts its claim against Appellant and, accordingly, the penal or non-penal nature of the claim of the United States must stand or fall upon the interpretation of said section.

Conclusion.

Wherefore, Appellant prays:

1. That the Order of the District Court, dated June 27, 1960, sustaining the levy of the United States of June 1, 1953 be reversed.
2. That the Order of the Referee, dated April 18, 1959, be affirmed.
3. That Appellant recover of Appellee its costs on appeal.

Respectfully submitted,

AARON LEVINSON,

R. K. WITTENBERG, and

QUITTNER, STUTMAN & TREISTER,

By HERMAN L. GLATT,

Attorneys for Cal-Neva Lodge, Inc.

APPENDIX.

Additional Statutes Involved.

Section 40.430, Nevada Revised Statute.

“There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of N. R. S. 40.430, 40.440 and 40.450. In such action, the judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judgment, to direct a sale of the encumbered property, or such part thereof as shall be necessary, and apply the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. . . . If it shall appear from the sheriff’s return that there is a deficiency of such proceeds and balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debts, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the clerk of the court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor.”

Section 40.440, Nevada Revised Statute.

“If there be surplus money remaining after payment of the amount due on the mortgage, lien or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.”

Section 40.450, Nevada Revised Statute.

“If the debt for which the mortgage, lien or encumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interests, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.”

No. 17046

United States
Court of Appeals
for the Ninth Circuit

CAL-NEVA LODGE, INC., a Nevada Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

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No. 17046

**United States
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CAL-NEVA LODGE, INC., a Nevada Corporation,
Appellant,
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UNITED STATES OF AMERICA,
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Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
District of Nevada

Index or Docket No. 923

In Arrangement-Chapter XI

In the matter of

CAL-NEVA LODGE, INC.; CAL-NEVA BILT-
MORE & CLUB CAL-NEVA

CLAIM OF UNITED STATES FOR TAXES

State of Nevada,
County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue for the District of Reno, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That Cal-Neva Lodge, Inc.; Cal-Neva Biltmore and Club Cal-Neva above named, is justly and truly indebted to the United States in the sum of \$205,813.52, with interest thereon as hereinafter stated.

2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Accounts for Which U. S. Claims Liens

Nature of Tax and Statute Involved: WT-FICA.

Account Number: 11-533 55L.

Year or Taxable Period Ended: 3Q55.

Date Interest Began (6% per annum): Int. 11-1-55;
Assd. 11-8-55.

Amount of Tax:	\$7,480.18
	198,333.34
	<hr/>
	\$205,813.52
	<hr/> <hr/>

Accrued interest due as of December 15, 1955:
\$210.40.

Additional interest will accrue at 6% from December 15, 1955, to date of payment of unpaid balance.

Liens claimed on above account from assessment date.

Accounts for Which U. S. Claims Priority

The sum of \$198,333.34, plus accrued interest from December 31, 1948, at the annual rate of 4% is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc. thereupon became liable in its own person for this amount, also interest at 6% on \$198,333.34 from June 1, 1953, date of levy.

3. That no part of said debt has been paid, but that the same is now due and payable at the office

of the District Director of Internal Revenue at Reno, Nevada.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6. That said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 27th day of December, 1955.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Subscribed and sworn to before me this 27th day of December, 1955.

/s/ HOMER H. FORRESTER,
Chief, DAR Branch.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

AMENDED PROOF OF CLAIM
(Claim of United States for Taxes)

State of Nevada,
County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue for the District of Reno, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That Cal-Neva Lodge, Inc.; Cal-Neva Biltmore and Club Cal-Neva above named, is justly and truly indebted to the United States in the sum of \$222,130.85, with interest thereon as hereinafter stated.

2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Accounts for Which U. S. Claims Liens
Nature of Tax and Statute Involved: WT-FICA.
Account Number: 11-533 55L.

Year or Taxable Period Ended: 3Q55.

Date Interest Began (6% per annum): Int. 11-1-55;
Assd. 11-8-55.

Amount of Tax:\$ 7,480.18

Accrued interest due as of December
15, 1955: \$210.40.

Additional interest will accrue at 6%
from December 15, 1955, to date of
payment of unpaid balance.

Liens claimed on above account from
assessment date.

Accounts for Which U. S. Claims Priority

Nature of Tax and Statute Involved:

WT-FICA.

Account Number: 1-1005 56L.

Year or Taxable Period Ended: 4Q55.

Date Interest Began (6% per annum):
Assd. 1-6-55.

Amount of Tax: 16,317.33

198,333.34

\$222,130.85

The sum of \$198,333.34, plus accrued interest from
December 31, 1948, at the annual rate of 4% is
claimed as a debt due and owing from Cal-Neva
Lodge, Inc., to the U. S., because of failure of

debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc. thereupon became liable in its own person for this amount, also interest at 5% on \$198,333.34 from June 1, 1953, date of levy.

3. That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue at Reno, Nevada.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to depositor's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6. That said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, adminis-

trator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 6th day of January, 1956.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Subscribed and sworn to before me this 6th day of January, 1956.

/s/ HOMER H. FORRESTER,

Chief, DAR Branch.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

SECOND AMENDED PROOF OF CLAIM

State of Nevada,
County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows:

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C. From the Date of Each Assessment.

Class of Tax and Period: WT-FICA 3Q55.

Assessment List: 11-533-55L.

Date of Assessment Lien date: 11-8-55.

Date Notice of Lien Filed*: 11-8-55.

Amount of Assessment: \$76,134.87.

Unassessed Penalty: None.

Interest to date: \$291.35.

Amount Outstanding: \$7,480.18.

Int. per day on bal. of Assessment: 1.23.

Total Lien Claims, \$7,771.53 plus \$1.23 per day interest.

Non-Lien Priority Tax Claims:

Class of Tax and Period: WT-FICA 4Q55.

Assessment List: 1-1005-56L.

Date of Assessment: 1-6-55.

Amount of Assessed Tax: \$16,317.33.

*This date is to be considered only in determining priority as between the federal tax lien and a purchaser, mortgagee, pledgee or judgment creditor under Section 6323, Title 26, U.S.C., also claiming an interest prior to bankruptcy. For all other purposes in the proceeding and in considering priority with other categories of claimants the date of assessment is the federal tax lien date.

Interest to date of Bankruptcy:

Amount Outstanding:*\$ 16,317.33

** 198,333.34

*** 35,038.88

Total Priority Claims\$249,689.55

Total Claim\$257,454.08

Plus****\$ 34.86

Pay day interest as above + 1.23

\$ 35.09

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

*Interest at 6% per annum from asst. date claimed on outstanding bal. of this account if debtor-in-possession assets exceed liabilities.

**The sum of \$198,333.34 is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc. thereupon became liable in its own person for this amount.

***Interest at 4% per annum from 12/31/48, date of note, to 6/1/53, date of levy, on above sum of \$198,333.34.

****Interest on above sum of \$198,333.34, plus \$35,038.88, is claimed at 6% per annum from 6/1/53, date of levy, and amounts to \$34.86 per day from 6/1/53.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Sworn to and subscribed before me this 6th day of March, 1956.

/s/ HOMER H. FORRESTER,
Chief, DAR Branch.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

ADDITIONAL AND SUPPLEMENTAL
CLAIM*

*This claim is for an amount due the U. S. which is additional to the amount claimed in the U. S. Proof of Claim filed with the Clerk of the U. S. Dist. Court on March 7, 1956.

State of Nevada,
County of Washoe—ss.

V. W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C., From the Date of Each Assessment—(Not filled out):

Non-Lien Priority Tax Claims

Class of Tax and Period	Amount of Tax	Penalties	Amount Outstanding
FY 5/31/52 Corp. Income	46,482.42	Del. 2,324.12 Fraud 23,241.21	\$ 72,047.75
FY 5/31/53 Corp. Income	168,237.15		
FY 5/31/53 Corp. Excess Profits	58,182.88		226,420.03

FY 5/31/54			
Corp. Income	77,559.55		
FY 5/31/54			
Corp. Excess Profits	15,750.00		93,309.55
FY 5/31/55			
Corp. Income	51,933.54	Del. 12,983.39	64,916.93
Total Priority Claims			<u>\$456,694.26</u>

Attachment B to ROSF Form 168

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Sworn to and Subscribed Before Me This 20th day of March, 1956.

/s/ HOMER H. FORRESTER,
Chief, DAR Branch.

Please refer to the reverse side of this form for additional information.

ROSF Form 168.

This additional and supplemental proof of claim is being submitted prior to actual assessment of the above taxes in accordance with appropriate Internal Revenue Code regulations, which provide for filing claims covering such liability whether or not the unpaid taxes have been assessed and whether or not examinations or other actions respecting the contemplated deficiencies have been completed.

Demand for payment of the above outstanding amounts in the total amount of \$456,694.26, is hereby made. A formal assessment of the tax liability of Cal-Neva Lodge, Inc., etc., for the above periods will be made upon completion of pending investigations.

/s/ V. W. EVANS,
District Director.

Sworn to and Subscribed Before Me This 20th day of March, 1956.

/s/ HOMER H. FORRESTER,
Chief, DAR Branch.

[Endorsed]: Filed March 24, 1956.

[Title of District Court and Cause.]

AMENDED PROOF OF CLAIM

State of Nevada,

County of Washoe—ss.

Vaughn W. Evans, District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

That the bankrupt(s), is justly and truly indebted to the United States for Internal Revenue taxes due pursuant to law as follows:

Taxes Secured by a Prior Lien Pursuant to Sections 6321 and 6322, Title 26, U.S.C., From the Date of Each Assessment—(Not filled out):

Non-Lien Priority Tax Claims					
Class of Tax and Period	Assessment List	Date of Assessment	Amount of Assessed Tax	Amount Outstanding	
WT-FICA					
4Q55	1-1005 56L	1-6-56	\$ 16,317.33*	\$ 16,317.33	
WT-FICA					
Addl	1-19051 56L	2-8-56	736.57*		
3Q55			Int 11.90**	748.47	
FUTA					
1955	1-305004 56L	2-8-56	2,434.98*		
			Int 3.19**	2,438.17	
CORP FY—	7-11-56	7-11-56	210,285.32*		
6/1/52-5/31/53	520035		Int 34,544.40**		
			Pen 105,142.66**	349,972.38	
CORP FY—	7-11-56	7-11-56	89,407.62*		
6/1/53-5/31/54	520036		Int 9,322.89**		
			Pen 44,703.81**	143,434.32	
CORP FY—	7-11-56	7-11-56	106,078.81*		
6/1/54-5/31/55	520037		Int 4,696.53**		
			Pen 53,039.41**	163,814.75	
				***198,333.34	
				**** 46,608.33	

(Footnote appears on following page.)

*Interest at 6% per annum claimed from assessment date to date of payment on these amounts if debtor's assets exceed liabilities.

**Claim is made for the amounts representing interest and penalties on these accounts if debtor's assets exceed liabilities.

***The sum of \$198,333.34 is claimed as a debt due and owing from Cal-Neva Lodge, Inc., to the U. S., because of failure of debtor to pay over certain moneys owing to Elmer F. & Helen L. Remmer upon presentation of levy. According to appropriate sections of the Int. Rev. Code, Cal-Neva Lodge, Inc., thereupon became liable in its own person for this amount.

****Interest is claimed at rate of 4% per annum from 12/31/48, date of note, to 7/1/50, when interest rate was changed to 6% by agreement of parties. Sum of \$46,608.33, represents amount of interest due as of date of levy on 6/1/53. Further claim is made for interest on the sum of \$244,941.67 (\$198,333.34 plus \$46,608.33), at 6% per annum from 6/1/53, date of levy, to date of petition. This will amount to \$40.26 per day from 6/1/53.

Total Priority Claims \$921,667.09 plus \$40.26 per day
interest from 6/1/53.

Attachment B to ROSF Form 168

That no part of said debt has been paid, but that the same is now due and payable at the office of the District Director of Internal Revenue.

That there are no set-offs or counterclaims to said debt.

That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debts, except statutory liens, or liens as above set forth.

That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 67 of the Bankruptcy Act.

/s/ V. W. EVANS,

District Director of Internal
Revenue.

Sworn to and Subscribed Before Me This 23rd
day of July, 1956.

/s/ HOMER H. FORRESTER,

Chief, DAR Branch.

ROSF Form 168.

[Endorsed]: Filed July 24, 1956.

In the United States District Court in and for the
District of Nevada

No. 923

In the Matter of
CAL NEVA LODGE, INC., a Nevada Corporation,
Debtor.

OBJECTIONS TO AMENDED PROOF OF
CLAIM OF DISTRICT DIRECTOR OF IN-
TERNAL REVENUE SERVICE FOR THE
RENO DISTRICT

The undersigned, the Debtor in possession herein,
files its objections to the Amended Proof of Claim

of the District Director of Internal Revenue Service for the Reno District, a duly authorized agent for the United States, on the following grounds, to wit:

(1) That the objections have already been heard and are now under submission by the Court to that portion of the Amended Claim which relates to the sum of \$198,333.34, which is claimed as a debt due and owing by the Debtor to the United States because of the failure of the Debtor to pay over certain moneys owing to Elmer F. and Helen L. Remmer, upon presentation of a levy, together with all interest claimed thereon; and for the purpose of this record, the Debtor reiterates, incorporates and makes a part hereof as though fully set forth herein, all of the grounds stated in the Amended Objections to Amended Proof of Claim of District Director of Internal Revenue Service for the Reno District, filed heretofore in this proceeding.

(2) That the Debtor is not indebted to the District Director of Internal Revenue Service for any amount whatsoever, as set forth in said amended claim.

(3) That said amended claim is not properly itemized and Debtor has been furnished with no proof, audit or itemization as to the basis of said claim; until such time as the District Director furnishes such proof, the Debtor is unable to audit its books or records to determine the basis of any liability, as set forth in said claim.

(4) That the penalties set forth in said amended claim are not provable or allowable under Section 57j of the Bankruptcy Act.

Wherefore, this Debtor prays that its objections be heard and appropriate orders be made.

CAL NEVA LODGE, INC.,
A Nevada Corporation,

By /s/ SANFORD D. ADLER,
President.

QUITTNER AND STUTMAN,
AARON LEVINSON and
LESLIE E. RIGGINS,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Debtor.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

REFEREE'S OPINION

On December 31, 1948, Cal Neva Lodge, Inc., purchased the Cal Neva Lodge, a property located in both the States of Nevada and California, from Elmer F. Remmer and Helen L. Remmer. As part of said consideration, Cal Neva Lodge, Inc., executed a first deed of trust on the Cal Neva Lodge property to the Remmers. To evidence the amount

of the purchase price remaining unpaid, Cal Neva Lodge, Inc., executed a note, in the State of California, to the Remmers, said note bearing interest at the rate of 4% per annum. Subsequently, the Remmers became involved in tax difficulties with the United States Government.

Pursuant to Section 6332(a) of the Internal Revenue Code, the United States, on June 1, 1953, levied upon the secured obligation of the Cal Neva Lodge, Inc., which was owing to the Remmers. Cal Neva Lodge, Inc., following said levy, sold the Cal Neva Lodge property to Park Lake Enterprises, Inc., said Park Lake Enterprises, Inc., agreeing thereupon to assume the secured obligation to the Remmers. On the basis of Section 6332(b) of the Internal Revenue Code, the United States asserts that the Cal Neva Lodge, Inc., is indebted to it in the sum of \$241,136.75 (\$198,333.34 principal, plus \$35,038.88 interest at 4% per annum, plus \$7,764.53 interest at 6% per annum from the date of the levy). There is now pending in this Court before the Honorable John R. Ross, an action by the Government against Park Lake Enterprises, Inc., to recover this claim.

Section 6332 of the Internal Revenue Code

“(a) Requirement—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or

discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“(b) Penalty for Violation—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6% per annum from the date of such levy.”

The claim of the United States against Cal Neva Lodge, Inc., for monies allegedly owing Cal Neva Lodge, Inc., to the Remmers is invalid for the reason that the Remmers themselves could not claim any liability on the note against Cal Neva Lodge, Inc., but are required by the law of the States of California and Nevada to look to the security first for payment.

The Cal Nevada Lodge is located in both the States of California and Nevada. The levy made by the United States on the Debtor herein was based upon the liability of said Debtor on its note to the Remmers at the time the levy was made. Thus, it is necessary to determine what rights, if any, the Remmers had in enforcing the note alone against the Debtor herein at the time of the Gov-

ernment's levy. A determination of these problems might normally give rise to a conflict of laws.

"The Supreme Court of the United States has laid down the following rules in reference to the law governing contracts in cases which the place of making and the place of performance are not the same: (1) Matters bearing upon the execution, interpretation and validity are determined by the law of the place where the contract is made; (2) Matters connected with the performance are regulated by the law of the place where the contract by its terms is to be performed; and (3) Matters relating to procedure depend upon the law of the forum." 11 Am. Jur., Section 118.

There is no conflict of laws problem in the instant case. Section 726 of the California Code of Civil Procedure provides that there shall be only one action maintained for the recovery of any debt secured by a mortgage and that action shall be by foreclosure. Nevada has a comparable statutory provision in NRS 40.430: "There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of NRS 40.430, 40.440 and 40.450 * * *" The Nevada statutory procedure provision and the California one are substantially the same.

"Under statutes which provide that only one action shall be maintained for the recovery of any debt secured by a mortgage and that it shall be by

foreclosure, it is held that an independent action ordinarily cannot be maintained on a debt, note, or bond secured by the mortgage or deed of trust until the security has been exhausted or shown to be valueless." 59 C.J.S., Section 342(b).

A leading California case in this phase of the security field is *Bank of Italy vs. G. J. Bentley* (1933) 217 C. 644. In finding that the beneficiary of a deed of trust securing a note could not maintain an action on the note before exhausting his security, the Court stated: "When deeds of trust are interpreted in connection with their history in this State, there is an implied contract between the parties thereto that the land shall constitute the primary fund to secure the debt and that a valid sale under a deed of trust must be had before an action may be maintained on the note." The beneficiary under the deed of trust contended that Section 726 of the Code of Civil Procedure was the only statute of the State of California requiring that the security be exhausted before suit could be maintained on the note. He argued that Section 726 referred only to mortgages and that a deed of trust was not a mortgage. The Court ruled against the beneficiary's contention and stated that a deed of trust is merely a mortgage with a power of sale.

The trust deed taken by the Remmers on the Cal Neva Lodge property was a purchase money deed of trust. Thus, pursuant to Section 580(b) of the California Code of Civil Procedure, the United States would be completely deprived of even its

right to a deficiency on the note because of the purchase money nature of the Remmers' trust deed. For the reason stated, the Remmers could not bring an action on the note against the Cal Neva Lodge, Inc., before exhausting their security. Therefore, the United States is barred in attempting to enforce collection of the note before the security is exhausted. To permit the United States to enforce payment pursuant to Section 6332 would inflict a penalty upon the debtor herein because it would deprive said debtor of his right to have his creditors seek relief from the security of the land alone.

The Court therefore concludes that the levy upon the debtor herein in the sum of \$198,333.34 principal, plus \$35,038.88 interest at 4% per annum, should be denied for the reasons hereinabove stated, and the Court further concludes that the sum of \$7,764.53 representing interest at 6% per annum from the date of levy on the aforementioned principal and interest should be denied for the reasons that the levy itself fails to constitute a lien against the debtor.

Entered at Las Vegas, Nevada, this 31st day of March, 1959.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
PETITION FOR REVIEW

At Las Vegas, in said District this 18th day of April, 1959, upon the petition of the District Director of Internal Revenue for the District of Nevada, and good cause appearing therefore.

It Is Hereby Ordered that the time within which a Petition for Review of the Order of April 18th, 1959, regarding the hearing on the Objections to Proof of Claim of District Director of Internal Revenue for the District of Nevada as Amended be, and the same is hereby extended to and including the 26th day of May, 1959.

/s/ JOHN C. MOWBRAY,

Referee in Bankruptcy.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Referee in Bankruptcy:

Pursuant to Section 39c of the Bankruptcy Act, the United States of America respectfully represents:

(1) Your petitioner is aggrieved by the order herein of John C. Mowbray, Referee in Bankruptcy, dated and filed April 18, 1959, a copy of which is attached hereto marked Exhibit "A," and which is made a part hereof.

(2) The Referee erred in respect to said order in that:

(a) The objection of the debtor should not have been sustained.

(b) There was sufficient evidence to establish that the books and records of the debtor corporation did not accurately reflect its true income.

(c) There was sufficient evidence to warrant the application of the percentage method for reconstruction of the income of the debtor corporation.

(d) The United States was not required to exhaust the security acquired by the Remmers on the Cal-Neva Lodge property before its claim in bankruptcy could be allowed.

(e) Said order of the Referee in Bankruptcy is erroneous and contrary to law.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, and that said order and opinion be reversed; and for such other and further relief as the court deems proper.

Dated: May 22, 1959.

HOWARD W. BABCOCK,
United States Attorney;

By /s/ HERBERT F. AHLSEDE,
Assistant U. S. Attorney;

LEON YUDKIN &
JOSEPH O. GREAVES,
Attorneys, Office of Regional Counsel, Internal Revenue Service,

By /s/ JOSEPH O. GREAVES,
Attorney.

EXHIBIT A

Copy.

In the United States District Court for the
District of Nevada

No. 923

In the Matter of

CAL NEVA LODGE, INC., a Nevada Corporation,
Debtor.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE OBJECTIONS TO
PROOF OF CLAIM OF DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE
DISTRICT OF NEVADA AS AMENDED

At Reno, in Said District, on the 18th Day of
April, 1959.

The instant matters came on to be heard from time to time before the undersigned Referee in Bankruptcy in his courtroom, United States Post Office Building, Reno, Nevada, upon objections filed by the Debtor herein to the Proof of Claim of the District Director of Internal Revenue for the District of Nevada as amended. The Debtor herein appeared by and through his attorneys, R. K. Wittenberg, Aaron Levinson, and Quittner, Stutman & Treister by R. K. Wittenberg, Aaron Levinson, and Francis F. Quittner. The District Director of Internal Revenue for the District of Nevada appeared by and through the United States Attorney for Nevada, Franklin Rittenhouse, and by Leon Yudkin and Joseph O. Greaves, Office of the Regional Counsel, Internal Revenue Service. The Court having heard the statements of counsel, having considered the evidence adduced, and having studied the memoranda filed herein by said counsel, and being fully advised in the premises,

Now, Therefore, this Court does hereby make its Findings of Fact, Conclusions of Law, and Order as follows:

Findings of Fact

I.

That the instant proceedings under Chapter XI of the Bankruptcy Act were commenced on the 12th day of November, 1955. That the District Director of Internal Revenue for the District of Nevada filed Proof of Claim in these proceedings dated December 27, 1955, setting forth a priority claim of

\$205,813.52. That thereafter the Debtor filed an amendment to said Proof of Claim dated January 6, 1956, setting forth a priority claim in the principal sum of \$222,130.85 plus interest. That on March 8, 1956, the Director filed a further amended Proof of Claim setting forth a priority claim of \$257,454.08 plus interest. That on March 24, 1956, the Director filed an additional Proof of Claim which increased the priority amount claimed to the total sum of \$456,694.26 plus interest. That, finally, on July 24, 1956, the Director filed his final amended Proof of Claim, said claim asserting a priority in the principal sum of \$921,667.09 plus interest thereon from and after June 1, 1953, at the rate of \$40.26 per day.

II.

That the parties hereto, by stipulation, have agreed that that portion of the said Amended Proof of Claim filed by the District Director of Internal Revenue for the District of Nevada as relates to withholding and FICA taxes for the fourth quarter of 1955 in the sum of \$16,317.33, additional withholding and FICA taxes for the third quarter of 1955 in the sum of \$736.57, and FUTA taxes for the year 1955 in the sum of \$2,434.98 should be allowed. That the Debtor and the District Director of Internal Revenue for the District of Nevada have further, by stipulation, agreed that the Debtor's claim for a refund of cabaret taxes previously paid in the amount of \$1,371.48 should be allowed by way of deduction from the Debtor's tax obligation to the United States.

III.

That the Debtor's income tax returns were prepared from the books and records of the Debtor which books were maintained in the regular course of business and in accordance with good accounting practice in the industry and there is insufficient evidence to establish that said books and records do not accurately reflect the income and expenses of the Debtor corporation.

IV.

There is insufficient evidence to warrant application of the percentage method urged by the Government to show the true income of the Debtor.

V.

That on December 31, 1948, the Debtor, on the basis of an agreement entered into in the State of California, purchased the Cal Neva Lodge, a property located in both the States of Nevada and California, from Elmer P. Remmer and Helen L. Remmer. That to evidence the amount of the purchase price remaining unpaid on the Cal Neva Lodge property, the Debtor, in the State of California, executed a note to the Remmers bearing interest at the rate of 4% per annum. That to secure said note to the Remmers, the Debtor executed a purchase money first deed of trust on the Cal Neva Lodge property to the Remmers.

VI.

That pursuant to Section 3692 of the Internal Revenue Code, the United States on June the first

of 1953 levied upon said secured obligation of the Debtor which was owing to the Remmers, which levy was for an amount in excess of the indebtedness from the Debtor to the Remmers. That at the time of said levy, Cal Neva Lodge, Inc., was indebted to the Remmers in the amount of \$198,333.34, plus accrued interest at 4% from December 31, 1948, which was evidenced and secured by the promissory note and deed of trust referred to in paragraph V. Said indebtedness was not subject to any attachment or execution under any judicial process at the time of the levy. That subsequent to said levy of June 1, 1953, the Debtor sold the Cal Neva Lodge, Inc., to the Park Lake Enterprises and agreed thereupon to assume the secured obligation to the Remmers.

VII.

That neither the Remmers nor the United States as a creditor of the Remmers has exhausted the security acquired by the Remmers on the Cal Neva Lodge property by virtue of the above-described purchase money first deed of trust given to the Remmers, nor has any payment been made by the Debtor, Cal Neva Lodge, Inc., to the United States of America pursuant to the levy made on Cal Neva Lodge, Inc., referred to in paragraph VI.

Conclusions of Law

I.

The objections of the Debtor to the amended Proof of Claim of the District Director of Internal

Revenue for the District of Nevada are sustained, save and except for those specific sums stipulated to by the parties as being validly owing and/or validly entitled to offset, as said sums are set forth in Findings of Fact No. II herein. That as to those items of indebtedness less the credit set forth as aforesaid in Findings of Fact No. II, the objections of the Debtor are overruled.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed:

I.

That the amended claim of the District Director of Internal Revenue for the District of Nevada on file herein in the principal sum of \$921,667.09 plus interest thereon be, and the same is, hereby disallowed, save and except for the sum of \$18,117.40, which said sum of \$18,117.40 only is allowed as a claim entitled to priority pursuant to the provisions of Section 64a(4) of the Bankruptcy Act.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy.

Received and Filed April 18, 1959.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 10, 1960.

In the United States District Court for the
District of Nevada

In Proceedings for an Arrangement

No. 923

In the Matter of

CAL-NEVA LODGE, INC., a Nevada Corporation,
Debtor.

OPINION AND ORDER SUSTAINING THE
LEVY OF THE UNITED STATES OF
JUNE 1, 1953

Collection of Federal taxes is governed by Federal law. State statutes cannot be invoked to frustrate that collection. It is well established that the law of the forum determines the nature, the form, and the extent of the remedy. As elsewhere, this principle obtains in the area of tax collection.

In the instant case, this Court is the forum. And in applying the remedy in aid of the collection of a Federal tax, this tribunal will be guided by the law of the forum—in other words, by Federal law.

1. Statement of the Case.

On April 1, 1959, the Referee in Bankruptcy filed an opinion holding that the levy of the United States upon a secured obligation of Cal-Neva Lodge, Inc., owing to Elmer F. Remmer and Helen L. Remmer, should be denied, and further concluding that the sum of \$7,764.53, representing interest at

6% from the date of the levy should be denied "for the reasons (sic) that the levy itself fails to constitute a lien against the debtor."

On April 18, 1959, the Referee filed "Findings of Fact, Conclusions of Law, and Order re Objections to Proof of Claim of District Director of Internal Revenue for the District of Nevada (hereinafter the Director) as Amended." The Referee's Order read as follows:

"That the amended claim of the District Director of Internal Revenue for the District of Nevada on file herein in the principal sum of \$921,667.09 plus interest be, and the same is, hereby disallowed, save and except for the sum of \$18,117.40, which said sum of \$18,117.40 only is allowed as a claim entitled to priority pursuant to the provisions of Section 64a(4) of the Bankruptcy Act."

On May 26, 1959, the United States filed a Petition for Review of the Order of the Referee of April 18, 1959, complaining, among other things, that:

(a) The United States was not required to exhaust the security acquired by the Remmers on the Cal-Neva Lodge property before its claim in bankruptcy could be allowed.

(b) The order of the Referee in Bankruptcy is erroneous and contrary to law.

On February 10, 1960, the Referee filed his Certificate of Review, which contained the following statement:

“Since the filing of the said Petition for Review the * * * Director * * * has abandoned that portion of its Review (sic) relating to alleged income taxes claimed as owing by the Debtor herein to the United States by filing an amended claim eliminating all claims for income taxes and penalties and interest thereon. The only matter now in controversy relates to the effect of the levy by the United States on June 1, 1953, on the secured obligation of the Debtor then owing to the Remmers.”

It is solely to the effect of the levy of June 1, 1953, therefore, that this opinion is directed.

2. Statement of Facts.

Cal-Neva Lodge, Inc., hereinafter the debtor, accepts the statement of facts set out in the Referee's Opinion of March 31, 1959, and this Court does likewise.

On December 31, 1948, the debtor purchased the Cal-Neva Lodge, a property located in both Nevada and California, from Elmer F. Remmer and Helen L. Remmer. As part of the consideration, the debtor executed a first deed of trust on the Cal-Neva Lodge property to the Remmers. To evidence the amount of the purchase price remaining unpaid, the debtor issued a note in California, to the Remmers, the note bearing four (4%) per cent interest.

Subsequently, the Remmers became involved in tax difficulties with the United States.

On June 1, 1953, the United States levied upon the secured obligation of the debtor, which was

owing to the Remmers. At the time of the levy, the debtor owed the Remmers \$198,333.34, plus accrued interest at 4% from December 31, 1948. In addition, the United States asserted a claim for interest at 6% from the date of the levy.

At this juncture, both parties and the Referee himself have fallen into a common error. All three assume that the claim of the United States was asserted pursuant to "Section 6332(b) of the Internal Revenue Code of 1954." But Section 6332(b) was enacted on August 16, 1954, and, according to 26 USCA 7851(6)(B), Section 6332, being part of Chapter 64 of Title 26, became effective "On and after January 1, 1955." As we have seen, the levy by the United States was made on June 1, 1953.

As a matter of law, the levy of the United States was made under the provisions of Section 3692 of the Internal Revenue Code of 1939, which was enacted on February 10, 1939, and which, except as to certain provisions not relevant here, took effect "on the day following the date of its enactment."

The section relating to the "Surrender of property subject to distraint," however, is 26 USCA 3710, which is part of the Internal Revenue Code of 1939. The pertinent portion of that section follows:

"Section 3710. Surrender of Property Subject to Distraint.

(a) Requirement. Any person in possession of property, or rights to property, subject to distraint,

upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) **Penalty for Violation.** Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy."

After the levy, the debtor sold the Cal-Neva Lodge property to Park Lake Enterprises, Inc., which agreed to assume the secured obligation to the Remmers.

The United States previously, and originally, asserted that the debtor was indebted to it in the sum of \$241,136.75, \$198,333.34 as principal, and \$35,038.88 as interest at 4%, plus \$7,764.53 as interest at 6% per annum from the date of levy. As we have seen, the United States now has eliminated "all claims for income taxes and penalties and interest thereon."

3. Federal Tax Liens and the Provisions for Their Collection Are "Strictly Federal and Strictly Statutory."

Both the debtor and the Referee in Bankruptcy make frequent references to California and Nevada law in support of their position that "there shall be only one action maintained for the recovery of any debt secured by a mortgage and that action shall be by foreclosure" and "In California, at least, even the right to recover on the note for any deficiency remaining after foreclosure is denied in the case of a purchase money mortgage," etc.

The problem before this Court is to be decided according to Federal and not State authority. The Ninth Court of Appeals, in *Bank of Nevada vs. United States*, 9 Cir., 1957, 251 F.2d 820, 824, certiorari denied, 1958, 356 U. S. 938, declared:

"The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory." (Many authorities cited and quoted.)

Quoting the above language with approval, our Court of Appeals followed the *Bank of Nevada* decision in *United States vs. Christensen*, 9 Cir., 1959, 269 F.2d 624, 637.

This, then, is the climate in which this Court must assess the debtor's contentions.

4. The Statutory Prohibition Against the Collection of a Penalty in a Bankruptcy Case Is No Longer Relevant in This Proceeding.

Despite the fact that, in the Referee's "Certificate on Review," filed on February 10, 1960, it was specifically stated that the United States had filed "an amended claim eliminating all claims for income taxes and penalties," etc., the debtor, in its "Reply Memorandum," filed more than two months later, insists that "the claim asserted against the Debtor by the United States under Section 6332(b) of the Internal Revenue Code must be disallowed in these proceedings as a penalty," etc.

Accordingly, in the present Opinion and Order, this Court will devote but little time to the "penalty" issue so earnestly raised by the debtor.

5. The Levy of the United States Upon the Debtor's Secured Obligation in Favor the Remmers Was Completely Effectual.

In his opinion of April 1, 1959, the Referee ruled that "The claim of the United States against Cal Neva Lodge, Inc., for monies allegedly owing (by?) Cal Neva Lodge, Inc., to the Remmers is invalid for the reason that the Remmers themselves could not claim any liability on the note against Cal Neva Lodge, Inc., but are required by the law of the State of California and Nevada to look to the security first for payment."

In addition, the debtor "bases its objection to the allowance of the amended Proof of Claim of the

* * * Director * * * on dual grounds. Initially, * * * the attempted levy by the United States * * * was completely ineffectual. Secondly * * * the claim asserted against the Debtor * * * must be disallowed * * * as a penalty," etc.

In the preceding section of this Opinion and Order, this Court has disposed of the debtor's second contention. Attention is therefore now addressed to the debtor's first objection. Namely: that the attempted levy by the United States was completely ineffectual.

At the outset, it should be borne in mind that it is a hornbook principle that "the law of the forum governs as to the nature, form, and extent of the remedy." (Emphasis supplied.) 15 CJS, Conflict of Laws, Section 9, Page 878; Section 22, Pages 948-952; 17 CJS, Contracts, Section 21, Pages 353-354.

It must be to Federal law, then, that we must look for guidance in determining the rights of the parties in the instant case.

The United States levied upon and seized the debt, not the security, which the debtor owed Remmer.

In *United States v. Eiland*, 4 Cir., 1955, 223 F. 2d 118, 121, Chief Judge Parker said:

"There can be no question, we think, but that the lien for taxes provided by the statute can be asserted against intangible property such as a debt.

(Many cases cited.) And we think it equally clear that the proper way to assert the lien is by levy and notice such as was served here.”

The claim of the United States for a debt seized prior to bankruptcy, under 11 USCA 104(a)(5), is a priority claim.

In the case of *In re Cherry Valley Homes, Inc.*, 3 Cir., 1958, 255 F. 2d 706, 707, certiorari denied, 1958, 358 U.S. 864, the Court used the following language:

“In legal contemplation and consequence, this levy effectively and exclusively appropriated the debt to the satisfaction of the tax claim six months before the Chapter X proceeding was instituted. (Cases cited.) Such a levy is treated in law like a seizure of corporeal property, taken into possession of a collector by way of distraint for taxes. (Authorities cited.) * * * By whatever name the appropriation shall be called, it seems clearly sufficient to establish a priority of right to satisfaction which the debtor’s subsequent insolvency does not affect.”

The remedy of the United States to enforce collection of taxes by the summary administrative method of distraint “is a special privilege it has which is analogous to, but in addition to, garnishment and other remedies of an ordinary creditor.” (Cases cited.) *United States vs. Manufacturers Trust Co.*, 2 Cir., 1952, 198 F. 2d 366, 368.

Continuing, in the Manufacturers Trust decision, Judge Chase said:

“It (the Government’s remedy) is a constitutionally valid expedient for the collection of taxes necessary to the very existence of government (cases cited), and has been available by law since 1791.” (Case cited.)

A claim by the United States under 11 USCA, 104(a)(5), *supra*, based upon a levy upon a bankrupt prior to bankruptcy, is an allowable one. In the Cherry Valley Homes case, *supra*, 255 F. 2d at Page 707, the Court observed:

“Alternatively, as the government urges here, since the possessory concept of ‘seizure’ is not strictly applicable to a debt, it seems correct to say that the tax levy through process served upon the debtor at least accomplished an assignment of Tobin’s claim against Cherry Valley to the United States by operation of law. This approach brings into decisive effect the provision of Revised Statutes, Section 3466, 31 U.S.C.A., Section 191, that ‘whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied.’ This language has been applied to claims, originally between private parties, the benefit of which has in various ways been assigned or transferred to the United States. (Cases cited.) We think it applies here as well.”

Such a claim is not a penalty in the instant case. Double liability is not sought. The debtor is merely

required to render unto Caesar the things that are Caesar's. Cal-Neva must pay only what it otherwise would be required to pay to Remmer.

As was remarked in the *Eiland* case, *supra*, 223 F. 2d at Page 121:

"The effect of the federal taxing statutes to which we have referred is to create a statutory attachment and garnishment in which the service of notice provided by statute takes the place of the court process in the ordinary garnishment proceeding. There is no necessity for adjudicating the amount of the tax under the statutory proceeding (cases cited); and, consequently the service of such notice results in what is virtually a transfer to the government of the indebtedness, or the amount thereof necessary to pay the tax, so that payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt."¹

Cal-Neva was indebted to Remmer at the time the United States levied on that debt. The obligation was due at that time. The debtor's failure to pay was a withholding of funds owing to the United States, for which the debtor must pay interest of 6% for electing not to pay the money at the time of the levy.

¹See also *Columbian Nat. Life Ins. Co. v. Welch*, 1 Cir., 1937, 88 F. 2d 333; and *Bank of Nevada v. United States*, *supra*, 251 F. 2d at Page 828.

In *United States v. Childs*, 1924, 266 U.S. 304, 309-310, the Supreme Court adverted to the distinction between interest and penalty, saying:

“The tax in this case is one on income; a burden imposed for the support of the Government. Interest is put upon it and so denominated, distinguished from the 5% as penalty, clearly intended to compensate the delay in payment of the tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment.”

Furthermore, the United States in this case has specifically eliminated all claims for income taxes and penalties and interest.

To summarize, the claim of the United States for money owing to the Remmers by the debtor Cal-Neva, which was levied upon prior to bankruptcy, is hereby allowed as a priority claim under 11 USCA, 104 (a)(5).

6. Conclusion.

In view of the holding of this Court regarding the levy of the United States, *infra*, and the abandonment by the United States of all its other claims, the Order of the Referee in Bankruptcy dated April 18, 1959, is hereby set aside, and in its stead the following Order is substituted:

Order

The levy of the United States on June 1, 1953, upon the secured obligation of the debtor then owing

to Elmer F. Remmer and Helen L. Remmer, in the amount of \$198,333.34, plus accrued interest at 4% from December 31, 1948, plus interest at 6% from the date of the levy, was completely effectual, and it is hereby sustained.

It is so Ordered.

Dated at Carson City, Nevada, this 27th day of June, 1960.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed June 27, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cal-Neva Lodge, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Opinion and Order Sustaining the Levy of the United States of June 1, 1953," dated June 27, 1960, made by the Honorable John R. Ross, Judge of the United States District Court, which reverses the Order of the Referee of April 18, 1959.

Dated: This 25th day of July, 1960.

Respectfully Submitted,

CAL-NEVA LODGE, INC.,
A Nevada Corporation, by Its
Attorneys,

AARON LEVINSON,
R. K. WITTENBERG,
QUITTNER, STUTMAN &
TREISTER,

By /s/ HERMAN L. GLATT.

[Endorsed]: Filed July 26, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August, 1960.

[Seal] OLIVER F. PRATT,
Clerk, U. S. District Court.

By /s/ [Indistinguishable],
Deputy.

[Endorsed]: No. 17046. United States Court of Appeals for the Ninth Circuit. Cal-Neva Lodge, Inc., a Nevada Corporation, Appellant. vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed August 10, 1960.

Docketed August 17, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17046

In the Matter of

CAL-NEVA LODGE, INC.,

vs.

UNITED STATES.

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Comes now Cal-Neva Lodge, Inc., the Appellant herein, and pursuant to Rule 75d of the Federal Rules of Civil Procedure, furnishes the following Statement of Points on Appeal:

1. That by its levy of June 1, 1953, the United States succeeded only to the rights had by Elmer and Helen Remmer, its tax debtors, against Cal-Neva Lodge, Inc.

2. That the nature of the rights to which the United States succeeded by virtue of its levy of June 1, 1953, must be determined by state law.

3. That the United States' levy of June 1, 1953, was ineffective in that the United States failed to seize the trust deed securing the indebtedness of Cal-Neva Lodge, Inc., to the Remmers.

4. That the United States, assuming its levy of June 1, 1953, was effective, was required to exhaust the security had by the Remmers against the Cal-Neva realty before it could attempt to assert

any deficiency claim against the Estate of Cal-Neva Lodge, Inc.

5. That by virtue of the fact that the Remmers' security was a purchase money trust deed, neither the Remmers nor the United States, as successor to their interest, were entitled to any deficiency from Cal-Neva Lodge, Inc.

6. That the entire claim asserted by the United States against Cal-Neva Lodge, Inc., is penal in nature and must be disallowed pursuant to the provisions of section 57 of the Bankruptcy Act.

7. That that portion of the claim asserted by the United States against Cal-Neva Lodge, Inc., as is for interest at a rate in excess of 4%, the rate contractually agreed upon between the Remmers and Cal-Neva Lodge, Inc., is penal in nature and must be disallowed pursuant to provisions of Section 57 of the Bankruptcy Act.

Dated: This 25th day of July, 1960.

Respectfully Submitted,

CAL-NEVA LODGE, INC.,

A Nevada Corporation, by Its
Attorneys,

AARON LEVINSON,

R. K. WITTENBERG,

QUITTNER, STUTMAN &
TREISTER,

By /s/ HERMAN L. GLATT.

[Endorsed]: Filed September 2, 1960.

No. 17049 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,

Appellants,

VS.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court
for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Brief of Appellants

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WEST SEATTLE HERALD

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No. 17049

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

**On Appeal from the United States District Court
for the District of Arizona**

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Brief of Appellants

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IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,

Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 17049

On Appeal from the United States District Court
for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Brief of Appellants

JURISDICTION

This is an appeal from a final order of the District Court of the District of Arizona, dated April 28, 1960, in which the Honorable Dave W. Ling, United States District Judge, presiding over the Phoenix Division, failed to grant and denied the appellants' motion to vacate judgment of dismissal with prejudice and to rene the appellants' claims for trial [R. 229], 28 U.S.C.A. § 1291 (62 Stat. 929 as last amended by 72 Stat. 348).

The claims are within the jurisdiction of the District

Court of Arizona pursuant to the laws of the state of Arizona as incorporated by the federal law, and upon rights under the Federal Tort Claims Act of August 2, 1946, 28 U.S.C.A. 1346(b) and 2671 *et seq.*; and the amounts in controversy exceed the sum of \$10,000.00 for each of the appellants.

The original order of dismissal with prejudice, dated October 6, 1960, has the effect of an adjudication upon the merits without hearing thereon, but is not the subject of this appeal, other than by way of the question as to whether it was an abuse of discretion of the District Court in denying the appellants an opportunity to have their day in court [R. 199].

QUESTIONS PRESENTED

1. Did the court abuse its discretion in failing to grant and in denying the appellants' motion to vacate judgment?
2. Was the court in error in disregarding the appellants' uncontroverted affidavits?
3. Under the showing on the record, should the appellants be given an opportunity to try their claims on the merits?
4. Should the court have granted the appellants' motion to vacate judgment and have renoted their claims for trial under Rule 60(b) ?

STATUTES INVOLVED

Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 60(b) : This appeal involves an interpretation and decision by the court as to whether or not the appellants are entitled to have their claims under the federal tort claims act, 28 U.S.C.A. §§ 1346(b) and 2671 *et seq.*, reopened and renoted for trial on the merits.

STATEMENT OF THE CASE

On or about the 14th day of October, 1958, the appellants filed and commenced actions in the United States District Court of the District of Arizona alleging injuries and damages negligently caused by the United States of America or its servants or agents on or about October 18, 1956 [R. 3-12]. Subsequently, on January 19, 1959, their claims were consolidated for trial [R. 19], and for all purposes are treated as a single case although involving two separate and individual claims. All proceedings including the judgment of dismissal which the appellants are attempting to set aside have been treated jointly, and the appellants are jointly prosecuting this appeal, because the issues are in all respects identical [R. 199 to end].

The appellants flew from Vashon, Washington, to Phoenix, Arizona, on or about October 1, 1959, arriving in Phoenix on that day, for the purpose of conferring with their counsel Hash and Hash in anticipation of trial of their claims which were set for October 6, 1959 [R. 221-226]. On Monday, October 5, 1959, their counsel Virginia Hash erroneously advised them not to show up in court for trial, and subsequently took upon

herself to withdraw from the case and to leave the appellants without representation in court. The appellants did not know where to obtain representation from other counsel on such short notice, and were intimidated into not appearing in court for trial without counsel. The United States attorneys thereupon took advantage of the appellants and obtained a judgment of dismissal with prejudice [R. 199, minute entry judgment].

Subsequent thereto, the appellants obtained counsel in Seattle, Washington, and conferred with respect to reinstating their claims for injuries and damages in the Arizona District Court. Counsel thereupon applied to the District Court in Arizona for a motion to vacate judgment pursuant to 28 U.S.C.A., Rule 60, Federal Rules of Civil Procedure [R. 207 and Appendix "B"].

Counsel presented the appellants' motion to vacate and supporting affidavits to the District Court, and presented oral argument for the purpose of reinstating their claims for injuries and damages [R. 215-226]. However, the court abused its discretion and denied the motion to reinstate and renote their claims [R. 207 and 229]. From the order of the court, the appellants take this appeal [R. 230-244].

Upon receipt of the appellants' motion for security and costs [R. 204], the appellants promptly deposited with the United States attorney's office in Phoenix, Arizona, the full amount of costs claimed against them [R. 206].

The appellants have at all times acted in good faith, and have applied to the court for an order vacating their claims for injuries and damages. However, the District Court has not reciprocated, and has simply dismissed their application without any reason whatsoever. There is nothing in the record to support the District Court's ruling and dismissal with prejudice against the appellants.

SPECIFICATIONS OF ERROR

1. The court erred in dismissing the appellants' claims with prejudice.

2. The court erred in failing to grant and in denying the appellants' motion to set aside and vacate its order of dismissal entered into the minutes on October 6, 1959.

3. The court abused its discretion in ignoring the appellants' uncontroverted affidavits in support of their motion to set aside and vacate judgment.

4. The court went beyond the scope of its authority in failing to apprise the appellants of its criteria for ignoring and for failing to grant and for denying their motion to vacate and set aside the judgment.

5. The court abused its discretion in failing to inform itself of possible facts which could sustain its refusal to vacate and set aside judgment of dismissal.

6. The court abused its discretion in failing to permit and in denying the appellants an opportunity to litigate their claims on the merits.

7. The court abused its discretion in adjudicating the appellants' claims without delving into the merits.

SUMMARY OF ARGUMENT

This appeal is from an order denying appellants' motion to set aside and vacate a final judgment rendered by the District Court of the District of Arizona, Phoenix Division, in which the court dismissed the appellants' claims with prejudice for want of prosecution, *Kuzma v. Bessemer & Lake Erie Railroad*, 3 Cir., 1958, 259 F.2d 456.

Even if the order is modified to restore the appellants' claim to a dismissal without prejudice, the statute of limitations has at all times been lapsed, Arizona Revised Statutes, Section 12-542. Therefore, even a dismissal without prejudice operates as a bar against trial on the merits.

The District Court should have resolved all doubts in favor of the appellants, on the basis of their uncontroverted and uncontradicted affidavits, and should have exercised its discretion under Rule 60(b) FRCP in favor of permitting the appellants to have the opportunity of trying their claims on the merits, rather than operating a forfeiture against them.

The specifications of error which we have outlined are so interwoven that we treat them essentially as one giant error which we make into a single topic for the purpose of argument.

ARGUMENT

I.

The District Court abused its discretion in failing to vacate and set aside its order of dismissal, in refusing to grant the appellants' motion, and in denying their motion for order setting aside the order of dismissal for apparent want of prosecution.

The appellants treat as axiomatic, with reference only to common sense, and without reference to any direct authority, that it is normal practice, in cases of unwarranted default maneuvers, to come into the very court which rendered the default and to apply under the appropriate rule (in this case Rule 60(b) Federal Rules of Civil Procedure) for an order of vacation, rather than a simple and direct appeal: How would an appellate court react to a dismissal with prejudice taken upon a default without the affidavits which the appellants have furnished the District Court?

This court has stated in *Russell v. Cunningham*, 9 Cir., 1960, 279 F.2d 797, 802:

“An order denying a 60(b) motion terminates proceedings in the District Court and therefore is a final and appealable order. *Cromelin v. Markwalter*, 5 Cir., 1950, 181 F.2d 616; *In re Marachowsky Stores Co.*, 7 Cir., 1951, 188 F.2d 686; *Darlington v. Studebaker-Packard Corp.*, 7 Cir., 1959, 261 F.2d 903; 7 *Moore's Federal Practice* (2 ed. 1955) § 60.30(3); 3 *Barron and Holtzoff, Fed. Prac. & Procedure* § 1332. These cases expressly state an order denying a motion under Rule 60(b) is appealable. In addition, there are many cases where appeals from denial of relief under 60(b) have been considered and passed upon without dis-

cussing the appealability of the order. The Supreme Court has done so. *Ackerman v. United States*, 1950, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207; see *Klapprott v. United States*, 1949, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. So have other courts. See, e.g., cases cited in *Darlington v. Studebaker-Packard Corp.*, 7 Cir., 1959, 261 F.2d 903. So has this Court. *Stafford v. Russell*, 9 Cir., 1955, 220 F.2d 853; *Atchison, Topeka & Santa Fe Ry. Co. v. Barrett*, 9 Cir., 1957, 246 F.2d 846.

"There is a line of cases, of which *Hicks v. Bekins Moving & Storage Co.*, 9 Cir., 1940, 115 F.2d 406, 409 is representative, stating 'The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree or order.' However, 'the rule has always been subject to not too clearly defined exceptions, sometimes characterized as an abuse of discretion.' *Greenspahn v. Joseph E. Seagram & Sons*, 2 Cir., 1950, 186 F.2d 616, 619. This 'exception' is firmly established and an order denying a motion made under Rule 60(b) is reviewable and will be set aside if an abuse of discretion is found."

- A. The district court abused its discretion in laying aside and in ignoring undenied affidavits presented by the appellants.

The appellants presented affidavits in support of their motion to vacate the judgment of dismissal based upon their having failed to prosecute. They gave their reasons which were essentially that they were misadvised and misapprised by counsel. The respondent sent out F.B.I. agents to investigate the truth of the appellants' affidavits, but produced nothing for the court record, and therefore in fact admits the truth of the

affidavits in their entirety. The court did not feel disposed to take any additional evidence on the matter, but ruled that upon the affidavits there was no sufficient justification for setting aside or vacating its previous dismissal with prejudice.

The law clearly favors trial of all claims, particularly when there are substantial rights or amounts of money involved, upon the merits, and disfavors summary disposals by default or otherwise.

Rooks v. American Brass Company, 6 Cir., 1959, 263 F.2d 166, 169, is illustrative of this point, in the following words:

“It has been declared in the Courts of Appeals that matters involving large sums of money should not be determined by default judgments if it can be reasonably avoided. *Tozer v. Charles A. Krause Milling Company*, 3 Cir., 189 F.2d 242, 245.

“The court also declares:

“ ‘Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. *Huntington Cab Co. v. American Fidelity & Casualty Co.*, D.C. W.Va. 1945, 4 F.R.D. 496, 498; *Standard Grate Bar Co. v. Defense Plant Corp.*, D.C.Pa. 1944, 3 F.R.D. 371, 372. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.’ ”

B. The district court abused its discretion in permitting a manifestly inequitable and unconscionable judgment to stand.

Where a claim has been dismissed with prejudice, while there are still genuine issues of fact to be re-

solved, upon an apparent but purely formalistic default, or dismissed without prejudice after the lapse of the statute of limitations, it is manifestly unjust or unconscionable to enforce the order of dismissal when the defaulted parties subsequent to the order make seasonable application to the court for reinstatement of their claims, and ask the court's indulgence in reviving their claims. The court should, with the ends of justice and good conscience in mind, assist the defaulted parties toward obtaining a full, fair and impartial consideration of their claims upon the merits. *Block v. Thousandfriend*, 2 Cir., 1948, 170 F.2d 428; *West Virginia Oil & Gas Co., Inc. v. George E. Breece Lumber Co., Inc. et al.*, 5 Cir., 1954, 213 F.2d 702.

The second circuit rendered an early decision under the present rules in *Block v. Thousandfriend*, *supra*, and stated at page 430 of the opinion:

“Rule 60(b), which became effective in March, 1948, provided not only that a judgment might be reversed for newly discovered evidence, but also in cases where ‘it is no longer equitable that the judgment should have prospective application,’ or might be reversed for ‘any other reason justifying relief from the operation of the judgment.’ ”

The fifth circuit agreed with the decision of the *Block* case, above, in *West Virginia Oil & Gas Co., Inc. v. George E. Breece Lumber Co., Inc. et al.*, *supra*, at page 704 of its opinion:

“On the other hand, the desire of the courts to repair an injustice wrought by a judgment will overcome the necessity for finality where it is

against conscience to execute that judgment and where that judgment was rendered without fault or neglect on the part of the party seeking to reform it. *Marine Insurance Company of Alexandria v. Hodgson*, 7 Cranch 332, 336, 11 U.S. 332, 336, 3 L.Ed. 362.

“Before the advent of the Federal Rules and from time immemorial, a judgment could not be corrected or reformed after the term of court had expired. In order to circumvent the rigor of this rule, courts of equity in their resourcefulness historically have recognized various types of writs and bills granting relief from judgments unconscionably obtained, including writs of *coram nobis*, *coram vobis*, *audita querella*, bills of review, bills in the nature of a bill of review, and the independent action in equity. As a result, the whole subject of ancillary remedies for relief from final judgments became ‘shrouded in ancient lore and mystery.’ In an effort to cut a path through this ‘ancient lore and mystery,’ the Federal Rules in Rule 60 set up a procedure for seeking relief from final judgments.”

The District Court was most unfair in closing itself to remedy by the appellants. It was not concerned with the truth or falsity, or sufficiency with the appellants’ showings, and arbitrarily, summarily, and unjustly foreclosed the appellants contrary to the express dictates of *United States v. Backofen*, 3 Cir., 1949, 76 F.2d 263 (following the *Klapprott* case), and *Federal Deposit Insurance Corporation, to the Use of the Secretary of Banking v. Alker*, 3 Cir., 1956, 234 F.2d 113, in which it was held that the District Court, upon assum-

ing jurisdiction over a motion for relief under Rule 60(b) Federal Rules of Civil Procedure, must conduct hearings to determine the truth or falsity of the applicant's motion before rendering any decision denying the application.

In support of appellants' contention that they should be awarded a trial on the merits, they call the court's attention to *United States v. Jordan*, 6 Cir., 1951, 186 F.2d 803, 806, affirmed 342 U.S. 911, 72 S.Ct. 305, 96 L.Ed. 682, in which the sixth circuit court declared:

“And it has long been a recognized exception to the general rule that under certain circumstances, such as where it is manifestly unconscionable for a successful adversary to enforce a judgment in his favor, relief will be granted by a court of equity against such judgment, regardless of the expiration of the term of its entry (Citing authorities).”

II.

The appellants should not be charged with erroneous advice of counsel, and should be permitted to reopen and renote their claims for trial on the merits.

The appellants were unable to present their claims in court for trial on the merits because of advice given by their counsel, and by their counsel's withdrawal from the cases on short notice. If they had had more time within which to act, they would certainly have had time to obtain counsel and receive a full trial on the merits and would not have been thrown out of court. There are a number of cases in which the court has stated that a claim can be reopened where the client should not be

charged with mistaken or erroneous advice on the part of counsel. See *Patapoff v. Vollstedt's Inc.*, 9 Cir., 1959, 267 F.2d 863; *Barber v. Turberville*, D.C. Cir., 1954, 218 F.2d 34; *Lucas v. City of Juneau*, D.C. Alaska, 1957, 20 F.R.D. 407.

Barber v. Turberville, *supra*, 36, states:

“In our opinion Rules 55(c) and 60(b) should be given a liberal construction. The dismissal by the trial court of the first count of the complaint and the substantial reduction of the award below the damages claimed under the second count indicate at the very least, that mitigating circumstances exist. For the plaintiff's part, no intervening equities are alleged which would cause hardship in the event the default were vacated, and the defendant has offered to post security for the amount of the judgment. Under these circumstances, consideration certainly may be given to the claims of a party requesting a proper trial of the action. See *Bridoux v. Eastern Air Lines, Inc.*, 1954, 93 U.S. App. D.C. 369, 214 F.2d 207; *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 1951, 189 F.2d 242, 245.

“That the defendant personally was not negligent in the protection of her interests seems clear from the facts recited. In situations such as are here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives. See e.g. *Elias v. Pitucci*, D.C.E.D. Pa. 1952, 13 F.R.D. 13; *Kantor Bros. v. Mutual Construction Co.*, D.C.E.D. Pa. 1943, 3 F.R.D. 227; *Robins v. Pitcairn*, D.C.N.D. Ill. 1940, 3 F.R.S. 60b.21, Case 2.”

The District Judge may have been under a misappre-

hension as to the effect of his decision, particularly in that the United States attorneys argued in their briefs that the previous decision was a dismissal without prejudice [R. 228], and in view of the fact that there is nothing in the record to indicate that the statute of limitations bars a new action.

Patapoff v. Vollstedt's Inc., 9 Cir., 1959, 267 F.2d 863, 865, states clearly with regard to an error or misunderstanding by the judge with respect to the manner in which he unwittingly forecloses a party by an order of dismissal, as follows:

“Both sides accept as correct the statement of appellant’s brief that ‘appellant had, at the time the “Confession” was signed, a complete defense to the involuntary petition.’ That was the record made on the motion.

“The record also discloses that at the time he denied the appellant’s motion, the trial judge was laboring under a misapprehension as to the consequences of his denial. Just after the attorneys had closed their arguments on the motion and left the court room, the Court stated: ‘There is a presumption that things done in the ordinary course of business are done according to the law. I don’t want to foreclose those parties of a right to be heard. They can be heard if they file their answer. That will take care of it.’

“The judge was wrong. *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587. He did not ‘want to foreclose’ appellant, but foreclose here he did.

“We think that on this record it was an abuse of

discretion for the court to deny the motion to vacate the adjudication. Rule 60(b) is clearly designed to permit a desirable legal objective: that cases may be decided on their merits. 'The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. * * * Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.' *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 189 F.2d 242, 245; accord, *Bridoux v. Eastern Air Lines*, D.C. Cir., 214 F.2d 207, 210." (Ellipses by the court).

"As stated by Mr. Justice Black in *Klapprott v. United States*, 335 U.S. 601, 614, 69 S.Ct. 384, 390, 93 L.Ed. 266: 'In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments, whenever such action is appropriate to accomplish justice.' Cf. *Bridoux v. Eastern Air Lines*, *supra*.

"Here the appellant made a showing that she had a defense which she was misled into waiving through the erroneous action of the attorney. She made that showing very promptly. The trial court, although stating 'I don't want to foreclose' this party, nevertheless, because of its plain misapprehension of the situation, accomplished just that foreclosure by its order. This involved something less than the 'careful study of all relevant considerations' referred to in *Tozer v. Charles A. Krause Milling Co.*, *supra*."

III.

Under the appellants' showings, this Court should not hesitate to reverse the District Court, and to direct the District Court to reneot and reset their claims for trial on the merits.

It is manifestly unjust to dismiss a complaint with prejudice for want of prosecution, and to refuse to vacate such order of dismissal. See *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 1951, 189 F.2d 242, 244:

"A motion to set aside a default judgment is addressed to the sound discretion of the court, and should not be disturbed on review unless there has been an abuse of discretion. See *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 3 Cir., 1942, 130 F.2d 185, 187. In a somewhat analogous situation, however, the court, in the interests of justice, has not hesitated to reverse an order and judgment dismissing a complaint with prejudice for lack of prosecution. *Peardon v. Chapman*, 3 Cir., 1948, 169 F.2d 909, 913."

A. The unqualified order of dismissal operates as a judgment of dismissal with prejudice:

1. Under state law.

28 U.S.C.A. § 2674 states in part as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances..."

With the above language, the Congress has stated that the law of the place of the tort governs, and incorporates any and all defenses and bars thereto, including statutes of limitations. Arizona has a two-year limitation on the bringing of actions, which expired for

the appellants on October 18, 1958. See Arizona Revised Statutes, Section 12-542, which reads as follows:

“There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

“1. For injuries done to the person of another.”

2. Under federal law

Kuzma v. Bessemer & Lake Erie Railroad, 3 Cir., 1958, 259 F.2d 456, held, per curiam, that a judgment of dismissal without qualification operates as a dismissal with prejudice, and creates a bar of res judicata in any other claims pending on the same subject matter.

B. The courts are loath to impose forfeitures, particularly in situations of default where the equities require trial on the merits to accomplish justice.

It has been held that even where cases have been dismissed, and some even adjudicated on the merits after trial, the courts will not hesitate to reopen where justice requires that a party be given a chance to introduce newly discovered evidence, or to have his claim tried on the merits.

1. Newly discovered evidence.

Serio v. Badger Mutual Insurance Company, 5 Cir., 1959, 266 F.2d 418, certiorari denied 361 U.S. 832, 80 S.Ct. 81, 4 L.Ed. 2d 73, involves a situation of newly discovered evidence.

At page 421 of the opinion, the court states:

“The sole basis for the denial of the motion (under Rule 60(b)) was a failure of the insured to find and produce the records at an earlier time. No prej-

udice to the insurance companies is shown to have resulted from the delay in the discovery of the evidence. Under the circumstances the delay in the filing of the motion was not unreasonable. See *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. The rule is to be liberally construed in order that judgments may reflect the true merits of a case. 3 Barron & Holtzoff, *Federal Practice and Procedure*, Rules Ed., 392, §1322. * * * Serio * * * was deprived of the right to attempt to prove that he had sustained a loss within the terms of the policies, and the amount of his loss sustained, because of the Iron Safe Clause. That impediment, he asserts by his motion, is now removed. * * * The district court held that a prudent person would have searched for the records at the place where they were subsequently found by accident. We do not agree.”

2. Forfeiture for want of prosecution.

In the second situation, in which the claimant has simply been deprived of a trial on the merits altogether, through some apparent failure or default on his part, the courts have still been favorably disposed to permitting an actual trial on the merits, and have held that Rule 60(b) should be most liberally construed in favor of the party who has not had his day in court. *United States v. Small*, D.C.N.Y., 1959, 24 F.R.D. 429; *Pierre v. Bermuth, Lembcke Co., Inc.*, D.C.N.Y., 1956, 20 F.R.D. 116.

The court stated in *United States v. Small*, *supra*, at page 430:

“It may be that defendant will be able to defeat

plaintiff's claim at the trial, as will hereafter appear. Accordingly any doubt as to whether, in the court's discretion, the motion should be granted, is resolved in the movant's favor."

Pierre v. Bernuth, Lembcke Co., Inc., supra, at page 117 of the opinion, the court again resolves in favor of the movant, and dispenses justice from its "grand reservoir of equitable power to do justice in a particular case," as follows:

"Under Rule 60(b)(6), this Court may vacate the order dismissing this action for 'any * * * reason justifying relief from the operation' of the order, if such motion is made, 'within a reasonable time.' This provision is 'a grand reservoir of equitable power to do justice in a particular case.' 7 Moore, Federal Practice p. 308 (2d ed. 1950).

"Defendant objects to vacating the dismissal at this late date because of the difficulty of defending an action for an injury suffered more than eight years ago.

"There is no doubt that trial of the case at this time would impose severe hardship on the defendant. But such hardship to the defendant should not prevent this plaintiff from securing a determination of his cause of action on the merits. Defendant was aware of plaintiff's mental illness and could have protected itself to a substantial extent at least by concluding all investigation at that time so that, if plaintiff became able to proceed to trial, defendant would not be unprepared. In fact, defendant did examine plaintiff by deposition in 1949 prior to his commitment to the mental hospital." (Deletes supplied by the court).

The record before this court [R. 199 to end] shows that the Arizona District Court, unlike the New York District Court in the above two quoted cases, was most stingy in dispensing its equitable powers to the appellants and did not care whether the appellants' cases were ever tried on their merits or not. The court ruled not only that the affidavits were untrue by its denial of the appellants' motion, but also that some highly speculative contrary was true, which contrary premise permitted the District Court to dispense frontier justice in the nature of a 15th Century adversary proceeding prevalent at one time in the British courts, namely, the District Court wished to engage the appellants in verbal gymnastics and slight of hand, and to spend as little time in trial session as possible.

The District Court concluded that Rule 60(b) is in effect a bunch of nonsense, and that it does not have to resolve any doubts in favor of the appellants. Rather, it prefers to resolve doubts, if any, in favor of the appellee, toward the goal of summarily concluding the cases if possible.

This very court has stated the policy of the circuit, in line with *Klapprott v. United States*, 1949, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266, and *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 1951, 189 F.2d 242, in *Russell v. Cunningham*, 9 Cir., 1960, 279 F.2d 797, 804, as follows:

“We realize that a Court has wide discretion in passing upon a motion under section 60(b) and that its action should not be set aside lightly with-

out a clear showing of abuse of discretion. *We realize, also, that the policy of the law is to favor a hearing of a litigant's claim on the merits.*" (Emphasis supplied.)

IV.

CONCLUSION

The District Court apprised the appellants of no criteria whatsoever in rendering its unfavorable decision and in failing to vacate judgment of dismissal with prejudice for the purpose of renoting and resetting their claims for trial. It is evidence of an abuse of discretion, in that the court cannot substantiate the position it takes, clearly in point with the following words from *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 1951, 189 F.2d 242, 245:

"What is excusable neglect and what is inexcusable neglect can hardly be determined in a vacuum. The opinion of the court below does not reveal what standard was applied nor what factors were weighed. The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. *Henry v. Metropolitan Life Ins. Co.*, D.C. Va., 1942, 3 F.R.D. 142, 144. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. *Huntington Cab Co. v. American Fidelity & Casualty Co.*, D.C. W.Va., 1945, 4 F.R.D. 496, 498; *Standard Grate Bar Co. v. Defense Plant Corp.*, D.C. Pa., 1944, 3 F.R.D. 371, 372. Since the interests of justice are best served

by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

In summary, the District Court should have resolved any ambiguity or doubt in favor of the appellants, and should have exercised its discretion toward the ends of justice and fair play in securing to the appellants a trial of their claims on the merits.

Respectfully submitted,

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APPENDIX "A"

APPENDIX "A"**Rule 60, Federal Rules of Civil Procedure.**

(a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX "B"

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ARIZONA
PHOENIX DIVISION

<hr/> WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife, and GLENN A. PRICE and JANE DOE PRICE, husband and wife, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	No. 2962 Phx No. 2963 Phx MOTION TO VACATE JUDGMENT
vs.		
UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Defendants.</i></div>		

COME NOW the plaintiffs, pursuant to Rule 60, Federal Court Rules, Civil Procedure — District Courts, and respectfully move the court for an order vacating judgment of dismissal with prejudice entered under consolidated cause numbers 2962 Phx and 2963 Phx onday of....., 1959, on the following grounds:

1. Clerical mistakes in the judgments, orders and other parts of the records and errors entered for oversight and omission which should be corrected;
2. Mistake, inadvertence, surprise, or excusable neglect;
3. Newly discovered evidence which by due diligence could not have been discovered in time to proceed under Rule 59(b), Federal Court Rules, Civil Procedure — District Courts;
4. Fraud ,misrepresentation, or other misconduct of an adverse party;
5. The judgment is void;
6. Any other reasons justifying relief from the operation of the judgment of dismissal, as presented by the plaintiffs in affidavits submitted herewith.

GREIVE AND LAW

By R. R. Bob Greive

Attorneys for Plaintiffs.

IN THE
United States
Court of Appeals
For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET
UX., and GLENN A. PRICE, ET UX.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

(No. Civ-2962 Phx. and No. Civ-2963 Phx.)

BRIEF OF APPELLEE

C. A. MUECKE

*United States Attorney
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IN THE
United States
Court of Appeals
For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET
UX., and GLENN A. PRICE, ET UX.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 17049

On Appeal from the United States District Court
for the District of Arizona

(No. Civ-2962 Phx. and No. Civ-2963 Phx.)

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Plaintiffs filed their complaint in the District Court of the District of Arizona at Phoenix naming the United States as a Defendant pursuant to the Federal Tort Claims Act (28 U.S.C.A. 1346, 2671, et seq.,) filed on Oct. 14, 1958. On January 19, 1959, pursuant to Plaintiffs' Motion to Consolidate for Trial, the case was set for trial on October 6, 1959. On October 6, 1959, the case was dismissed by Order of the Court; on April 28, 1960, an Order of Court was entered denying the Motion to Vacate Judgment. The jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C. 1291.

QUESTION PRESENTED

Did the District Court abuse its discretion in failing to grant and in denying the Appellants' Motion to Vacate Judgment?

STATUTES INVOLVED

Federal Rules of Civil Procedure, 28 U.S.C. Annotated, Rule 60(b) :

This appeal has the central issue of whether or not the District Court abused its discretion when it denied the Plaintiffs' Motion to Vacate the Order Dismissing the Complaint. Pursuant to Rule 60(b), the Statute reads as follows :

“(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a

judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1958, eff. Oct. 20, 1949.”

STATEMENT OF THE CASE

On or about the 14th day of October 1958 the Appellants filed complaints in the United States District Court for the District of Arizona at Phoenix alleging in effect that the United States was liable to said Appellants for money damages due to the fact that an agent of the Federal Aviation Administration negligently gave unsafe radio directions and the plane in which the Appellants were occupants crashed short of the runway. (R-3-12). On January 19, 1959, their claims were consolidated for trial (R-19). The case was set for trial on October 6, 1959. The Appellants arrived in the Phoenix area and stayed at the Sahara Hotel in Phoenix from approximately October 1st through October 6th (R-221-226). The affidavit of the Appellants reflects that they had been engaged in the consumption of large amounts of intoxicating beverages, and they had a discussion with their legal counsel, Miss Virginia Hash, in the afternoon of the day before trial on which day the case was set for retrial, and that they then did not make themselves present in the District Court on October 6, 1959. They knew the case was set for trial on October 6, 1959, but they deliberately and knowingly did not make themselves present (R-221-226). The record is barren and no one has at any time taken the position that the Appellants took any steps to notify the Court that they

would not be present or rectify the situation in any manner whatsoever. According to Appellants brief (B(4)), they then left the area of Phoenix at an undetermined time and returned to Seattle, Washington, where they obtained counsel who applied to the District Court in Arizona for a Motion to Vacate Judgment pursuant to 28 U.S.C.A. Rule 60(b), Federal Rules of Civil Procedure (R-207). The hearing on this Motion was held on February 8, 1960 (Appendix B). At that time affidavits were filed with the Court in support of Appellants' Motion to Vacate the Judgment and reinstate the claims for injuries and damages. The Court took under advisement the Plaintiffs' Motion of February 8, 1960, and at its discretion on April 28, 1960, denied the Motion to Vacate and reinstate the claim for Plaintiffs' injuries. The Plaintiffs have not acted in good faith even if the facts are viewed in the light most favorable to the Appellants; they did not take any action to notify the Court or any one else that they had had a disagreement with their counsel concerning their physical and mental health and took no steps that a reasonable and prudent man would take under the circumstances knowing that their cause was set for trial the next day. For reasons known only to themselves they willfully refused to present themselves for trial to prosecute their claims (R-221-226).

SUMMARY OF ARGUMENT

It is the Appellees' position that the decision of the District Court was correct and should be sustained for the following reasons:

I. That the District Court did not abuse its discretion in denying the Motion to Vacate the Order.

II. The District Court did not abuse its discretion in failing to vacate and set aside its Order of Dismissal, and did not abuse its discretion in refusing to grant the

Appellants' Motion and in denying their Motion for Order Setting Aside the Order of Dismissal for apparent want of prosecution.

II-A. The District Court did not abuse its discretion in laying aside and ignoring affidavits presented by the Appellants even if the affidavits were not controverted by the F.B.I. investigation.

II-B. The District Court did not abuse its discretion in permitting a manifestly inequitable and unconscionable judgment to stand.

III. The Appellants are not being charged with erroneous advice of counsel, and even if counsel did give them erroneous advice, they should not be permitted to reopen and restate their claims for trial on the merits.

IV. The Appellants have presented nothing to this Court to substantiate a reversal by this Court of the action of the District Court.

IV-A. The Government agrees that the unqualified Order of Dismissal operates as a Judgment of Dismissal with prejudice under both state and federal law.

IV-B. The Government agrees that the Courts are loathe to impose forfeiture, particularly in situations of default where the equities require trial on the merits to impose forfeiture.

IV-B-1. The Government agrees that if there were newly discovered evidence it would be a proper ground for new trial.

IV-B-2. The Government agrees that Rule 60(b) should be liberally construed in cases of forfeiture for want of prosecution.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE ORDER TO VACATE THE ORDER OF DISMISSAL.

The real issue in this case is whether or not the Appellants have sustained their burden of showing that there was a mistake, inadvertence, excusable negligence or any other reason justifying relief from the operation of the Judgment, pursuant to Rule 60(b) and that the District Court abused its discretion in denying their motion. This Court has repeatedly held that a petition to vacate a judgment is addressed to the sound legal discretion of the Trial Court and its determination will not be disturbed except for abuse of discretion. *Independence Lead Mines Company vs. Kingsbury, et al.*, 9 Cir., 1949, 175 F.2d 983; *Cole vs. Fairview Development, Inc.*, 9 Cir., 1955, 226 F.2d 175, 176; *Siberell vs. United States*, 9 Cir., 1959, 268 F.2d 61; *Russell vs. Cunningham*, 9 Cir., 1960, 279 F2d 797 at 804.

At the time the District Court entered its original Order of Dismissal of October 6, 1959, the Plaintiffs were not present to prosecute their claim and their attorney had withdrawn from the case (Appendix A). The Appellants do not seriously contest the Court's authority to dismiss a claim that has been set for trial for several months and where the plaintiff does not appear in Court to prosecute; therefore the Order entered on October 6, 1959, was valid. The Appellants are really contending in this argument that there was a good reason for their failure to appear in Court. This excuse not to be present in court for their trial, although elusive, seems to be set forth by the Appellants on the following grounds:

1. The District Court abused its discretion in laying aside and ignoring affidavits presented by the Appellants. At the outset, the Government is agreed and does not attempt to dispute the fact that the Judgment appealed from is a final one and that the general rule of law is that motions brought, pursuant to Rule 60(b), should be treated liberally by the courts in order to grant the parties their day in court; however, the Appellants should first have the burden of meeting one of the requirements of Rule 60(b) so that the order can be set aside if it appears that the trial court abused its discretion. The position of the Appellants is that their affidavits show good reason why the Judgment should be set aside. These reasons are that they were misadvised and misapprised by counsel. The only thing that the record shows according to Appellants' affidavits (Record 221-226) is that on the afternoon before the trial Miss Hash had an adverse reaction to the Appellants in that she either correctly or mistakenly judged the Plaintiffs as being intoxicated and advised that the Court would dismiss the case and hold the Plaintiffs in contempt if they presented themselves in an intoxicated condition in Court. This is the only inference possible to draw from the affidavits of the Appellants, particularly on Page 222 and Page 225. It should be noted that this alleged conversation between Appellants and counsel took place the day before trial. Nowhere do Appellants allege that Miss Hash advised them not to be present. Nowhere is it alleged that Miss Hash advised them or gave the impression that she would no longer represent them. The only reference to this point in the affidavits is on Pages 222 and 225, which is to the effect that Miss Hash was mistaken when she thought they were drunk the afternoon before the trial. Miss Hash was present in Court the morning of the day set for trial (Appendix A). The Plaintiffs were not present (Appendix A). No-

where in this record, or anywhere else, do they ever say why they were not present.

2. Appellants' contention furthermore is that the Plaintiffs gave good reasons for not being in Court, to-wit: that they were misadvised and misapprised by counsel (Appellants' Brief Page 8) and that FBI Agents were sent to investigate the truth of Appellants' affidavits but presented nothing for the Court's record and therefore in fact the Government admits the truth of the affidavits in their entirety. This is not true. The FBI did investigate the matter and made a written report, a part of which is set out in Appendix C, to the effect that Appellants' affidavits are controverted. There was no burden on the Court to make the FBI report part of the record. A pertinent part of that report, although not in the record, is set forth here because the Appellants have mentioned the FBI report together with an erroneous conclusion. The full report is in the Office of the United States Attorney for the District of Arizona and is available for inspection by the Appellants and will be made a part of the record if the Appellants so desire and the Court grants permission.

The Court at all times had a desire to understand the factual situation (Appendix B). No matter what interpretations are placed on the affidavits of the Plaintiffs it is still quite clear that they, of their own free will, made the decision not to appear at the time set for the trial. Although it is difficult to find a case directly on point in this matter, it is interesting to note what the Supreme Court of the United States has stated concerning a situation where the Defendant, under a mistaken impression that the law was against him, deliberately refused to prosecute an appeal. *Polites v. United States*, 364 U.S. 426, 431-433, 1960. This decision is the

latest Supreme Court case on this point and the Court said:

“On August 6, 1958, the petitioner filed his motion under Rule 60(b)(5) and (6) to set aside the 1953 denaturalization decree. The ground for the motion, supported by an affidavit of counsel, was that in the light of this Court’s opinions in two cases which had recently been decided, *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670, ‘it now appears that the . . . judgment of cancellation is voidable’ and ‘that it is no longer equitable that said judgment should have prospective application.’ In denying the motion the District Court held that the *Nowak* and *Maisenberg* decisions ‘do not as contended by Polites clearly control the instant case warranting relief from judgment,’ and that, in any event, the doctrine of *Ackermann v. United States*, 340 U.S. 193, precludes reopening a judgment under Rule 60(b) where the movant has voluntarily abandoned his appeal, and the only ground for the motion to reopen is an asserted later change in the judicial view of applicable law. 24 F.R.D. 401. The Court of Appeals affirmed ‘for the reasons set forth’ by the District Court, 272 F. 2d 709.

* * *

“In the present case it is not claimed that the decision not to appeal was anything but ‘*free, calculated, and deliberate.*’ Indeed, there is not even an indication in this case, as there was in *Ackermann*, that the choice was influenced by reliance upon the advice of a government officer. The only claim is that upon the advice of the petitioner’s own counsel the appeal was abandoned because there seemed at the time small likelihood of its success, and that some four years later the applicable law was ‘clarified’ in the petitioner’s favor.

“Despite the relevant and persuasive force of *Ackermann*, however, we need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law,

relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law. The fact of the matter is that that situation is not presented by this case. Without assaying by hindsight how hopeless the prospects of the petitioner's appeal may have appeared at the time it was abandoned, it is clear that the later decisions of this Court upon which his motion to vacate relied did not in fact work the controlling change in the governing law which he asserted. The decisions in question are *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670." Emphasis supplied. *Polites v. United States*, 364 U.S. 426, 431-433, 1960.

This case was based on *Ackermann v. United States*, 340 U.S. 193, 197-200, 1950. A pertinent part of the Ackerman case, *supra*, is quoted below:

"It will be noted that petitioner alleged in his motion that his failure to appeal was *excusable*. A motion for relief because of excusable neglect as provided in Rule 60(b) (1) must, by the rule's terms, be made not more than one year after the judgment was entered. The judgment here sought to be relieved from was more than four years old. It is immediately apparent that no relief on account of 'excusable neglect' was available to this petitioner on the motion under consideration.

"But petitioner seeks to bring himself within Rule 60(b) (6), which applies if 'any other reason justifying relief' is present, as construed and applied in *Klapprott v. United States*, 335 U.S. 601. The circumstances alleged in the motion which petitioner asserts bring him within Rule 60(b) (6) are that the denaturalization judgment was erroneous; that he did not appeal and raise that question because his attorney advised him he would have to sell his home to pay costs, while Kelley, the Alien Control Officer, in whom he alleges he had confidence and upon whose advice he relied, told him 'to hang on to their home' and that he would be released at the end of the war;

and that these circumstances justify failure to appeal the denaturalization judgment.

“We cannot agree that petitioner has alleged circumstances showing that his failure to appeal was justifiable. It is not enough for petitioner to allege that he had confidence in Kelley. On the allegations of the motion before us, Kelley was a stranger to petitioner. In that state of the pleadings there are two reasons why petitioner cannot be heard to say his neglect to appeal brings him within the rule. First, anything said by Kelley could not be used to relieve petitioner of his duty to take legal steps to protect his interest in litigation in which the United States was a party adverse to him. *Munro v. United States*, 303 U.S. 36; *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911, 913, aff’d *per curiam sub nom. Burnham Chemical Co v. Chapman*, 86 U.S. App. D.C. 412, 181 F.2d 288.”

* * *

“By no stretch of imagination can the voluntary, deliberate, free, untrammelled choice of petitioner not to appeal compare with the Klapprott situation. MR. JUSTICE BLACK set forth in order the extraordinary circumstances alleged by Klapprott. We paraphrase them and give the comparable situation of Ackermann.”

Ackermann v. United States, 340 U.S. 193, 197-200 (1950)

Admittedly these cases are not directly in point, however, they do show the reasoning of the Supreme Court that when one takes a deliberate course of action with knowledge of their attorney’s opinion, it cannot be considered to be excusable neglect under Rule 60(b). Although it is never specifically stated on just exactly what ground the Appellants here qualified for relief under Rule 60(b), it is assumed that one of their propositions is excusable neglect and the mistake of their attorney. Assuming for the moment that their attorney was mistaken in assuming that they were drunk the day

before trial, does this give them an excuse to not be present the day of trial, and furthermore, did they do all that could be expected of them and thus entitle themselves to absolution from responsibility for their attorney's negligence? The Court in *Ledwith v. Storkan*, 2 F.R.D. 539, 544, 545, deals with what constitutes excusable neglect and the Court said:

"Save in those cases where the court has granted its indulgence without real study and as if the vacation of the judgment were virtually an arbitrarily demandable right of the delinquent party, there is no practical difference of opinion upon the point that neglect or inadvertence resulting in default will not alone justify the vacation of the ensuing judgment. The neglect or inadvertence must be excusable, and real and practical grounds for excuse must be factually shown in support of the motion.

"It may be added that while inadvertence and neglect are not precisely identical in their connotations they are often classified as synonymous. See Webster's New International Dictionary 1925 Edition. They are frequently employed interchangeably in applying the tests imported into Rule 60(b). And finally, though in the rule, and in the statutes underlying it, the word 'excusable' does not precede the word 'inadvertence,' the pertinent decisions deny relief on the ground of inadvertence unless it is actually excusable.

"Precisely what circumstances will avail to render the neglect of counsel excusable may not be adequately set down. But some measure of excusability may be gotten from decisions where relief has been granted. They include (a) continuous preoccupation with the trial of a distracting first degree murder case, (b) reliance on assurance by the court or a clerk thereof or opposing counsel as to the time of a trial, (c) failure to reach the place of trial in consequence of casualties in traffic, (d) sudden illness of counsel, (e) unanticipated summons to the bedside of a dying relative, and other like incidents. In each instance there was inad-

vertence or neglect which intercepted the timely performance of a required act, but there was likewise some disturbing and distracting event which rendered the error excusable.

“Inevitably, the argument of the defendants must proceed to the point where they assert, that having employed counsel for the protection of their interests, *they did all that could be expected of them and are entitled to absolution from responsibility for their attorney’s negligence.* But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client. An analysis of cases relevant to the issue is made in a note to *Citizens’ National Bank of Sisseton v. Branden*, 19 N.D. 489, 126 N.W. 102, in the report of that case appearing in 27 L.R.A., N.S., on page 858. See also 34 C.J. 307-313.

“So, it appears to the court that the showing in support of the motions will not sustain their allowance. The vacation of a default judgment duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party. Unless and until he shows that his default and the resultant judgment are attributable to his ‘mistake, inadvertence, surprise or excusable neglect,’ the rule invoked confers no authority upon the court to vacate the judgment and allow him to answer. In the absence of such a showing, the judgment must stand regardless of any inclination towards indulgence, to which the court may be prompted.

“Even when he makes the showing required by the rule, his claim to relief is not absolute. He merely invokes them, and by that showing, the exercise by the court of a sound judicial discretion as to whether the vacation solicited should be allowed. It is true that, upon adequate showing, the court’s discretion should ordinarily incline towards granting rather than denying relief, especially if it be manifest that no intervening rights have attached in reliance upon the judg-

ment and no actual injustice will ensue. And the reported decisions under the rule reflect the pursuit of that practice.

“But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of ‘inadvertence or excusable neglect.’ If the showing be inadequate fairly to establish such ‘inadvertence or excusable neglect,’ the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought.

“Convinced, therefore, of the inadequacy of the present showing, the court is entering an order denying and overruling the motions.” Emphasis supplied. *Ledwith v. Storkan*, 2 F.R.D. 539, 544, 545.

Applying that reasoning to the factual situation presented here even if their counsel was mistaken on the day before trial, counsel was present in Court on the day set for trial and there was nothing in the record to show that she would not have represented the Plaintiffs, Appellants herein, if they had been present. She was present in Court; she was not negligent or neglectful, and therefore there is no attempt here to impute her negligence to them because there has been no showing by the Appellants that she was negligent or mistaken on October 6th when the case was called for trial. Assuming *arguendo* that she was present but somehow or other had committed some form of negligence or made a mistake, the Appellants certainly did nothing to absolve themselves.

The position of the Government is that here there has been no showing of any mistake, negligence or any other reason justifying relief of the operation of the Judg-

ment. Here there was no negligence on the part of the counsel because counsel was present in Court. If there was any negligence, it was on the part of the Appellants because they were not present in Court, blaming their lack of presence on the fact that they had an argument with counsel. They have never set out with any degree of clarity that counsel advised them not to be present the next day unless one might infer that counsel advised them not to be present if they were drunk. Secondly, there was no allegation in the affidavits that counsel advised the Appellants that they should not be present for trial even if they were sober (R-222-226); therefore, if there was negligence on the part of the Plaintiffs they have not even alleged any factual situation in their affidavits that it was excusable; they offer no real excuse. They offer no other factual situation to justify relief from the operation of the Judgment. Defense of this appeal by the Government is not an attempt to name call or to further the interests of non-drinkers. The general imbibing in alcohol is not condemned here. In any event, one cannot blind one's eyes to the facts, and what earthly reason would there be for the Plaintiffs not to be present in Court if they were sober? Rule 60(b)(6) requires a showing of other reasons justifying relief aside from the mistake, inadvertence, excusable neglect, etc. This is essentially an *equitable* principle and it can be hardly said that the Plaintiffs come before this Court with clean hands. *Assmann v. Fleming*, 8 Cir., 1947, 159 F. 2d 332. The Government has no quarrel with the view of the law presented by the Appellants, but the position of the Government is that they do not have sufficient facts to come under the rules of their cited cases. The crux of this appeal is whether or not Judge Ling abused his discretion. One can consider this issue from the standpoint that the facts show as a matter of law that the discretion was or was not abused. On the other hand, have the Ap-

pellants shown sufficient facts to lead this Court to the conclusion that Judge Ling committed an abuse of discretion in denying the Motion to Vacate the Order of Dismissal? In the interests of order each of the Plaintiffs' arguments will be answered.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO VACATE AND SET ASIDE ITS ORDER OF DISMISSAL, AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE APPELLANTS' MOTION AND IN DENYING THEIR MOTION FOR ORDER SETTING ASIDE THE ORDER OF DISMISSAL FOR APPARENT WANT OF PROSECUTION.

The Government agrees with the ruling and the reasoning as stated by this Court in *Russell v. Cunningham*, 9 Cir., 1960, 279 F. 2d 797. It is difficult to resist the observation that the only similarity between the facts in that case and the case at bar is the name Cunningham.

II-A

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LAYING ASIDE AND IGNORING AFFIDAVITS PRESENTED BY THE APPELLANTS EVEN IF THE AFFIDAVITS WERE NOT CONTROVERTED BY THE F.B.I. INVESTIGATION.

The affidavits state no reason for relief; they fail to state that defense counsel advised them not to be present in Court at the time set for trial, and they failed to state any reason why they were not present for trial.

The pertinent statement in Price's affidavit is:

"... forced to accept whatever disposition Miss Hash decided to make of the matter." (R-222)

Miss Hash was in Court and withdrew when the Plaintiffs were not present. The most that can be inferred here is Miss Hash represented to Plaintiffs that she would not represent them if they were intoxicated in Court; not that she would not represent them under any conditions.

Cunningham says “. . . In her opinion the Judge would be unwilling. . .” (R-225)

It is interesting to note that Appellants come before this Court with the facade of showing everything that happened. However, where is the affidavit of Miss Hash? The Appellants returned to Phoenix to obtain affidavits to show they were not intoxicated. It would not advance their cause to have an affidavit of Miss Hash to the contrary and for this the Government does not blame them. But if she did advise them not to be present, etc., would she not say so in her affidavit? The Government probably could not get an affidavit from her due to the attorney-client privilege; however, why have the Appellants not come forward with the only affidavit which could truly enlighten this Court?

See *Parker v. Broadcast Music, Inc.*, C.C.A., 2, April 27, 1961, 4 F.R. Serv. 2d 606.33.

II-B

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING A MANI- FESTLY INEQUITABLE AND UNCON- SCIONABLE JUDGMENT TO STAND.

The Government agrees with the view of the law of Plaintiffs-Appellants as set forth in their Argument I-B; however, the problem is, is this Judgment inequitable and unconscionable? There the contention of the appellants falls on the facts.

III

THE APPELLANTS ARE NOT BEING CHARGED WITH ERRONEOUS ADVICE OF COUNSEL, AND EVEN IF COUNSEL DID GIVE THEM ERRONEOUS ADVICE THEY SHOULD NOT BE PERMITTED TO REOPEN AND RENOTE THEIR CLAIMS FOR TRIAL ON THE MERITS.

The Plaintiffs-Appellants have not stated what or how any advice given them by counsel was erroneous, nor have they even stated that their counsel gave them notice that she was going to withdraw no matter how short such notice may have been. Counsel did not withdraw until after the case was called for trial and the Plaintiffs were not present (Appendix A).

IV

THE APPELLANTS HAVE PRESENTED NOTHING TO THIS COURT TO SUBSTANTIATE A REVERSAL BY THIS COURT OF THE ACTION OF THE DISTRICT COURT.

There has been no showing of an abuse of discretion and, as this Court has repeatedly stated, under the rule a refusal to vacate is within the discretion of the Trial Court and may be reversed only for abuse of that discretion. Certainly considering the showing pro and con here, no abuse of discretion is discernible nor was error committed in the procedure followed. The Trial Court's ruling on the motion is accurate and affirmed. *Cole v. Fairview Development, Inc.*, 9 Cir., 1955, 226 F.2d 175. This Court should certainly hesitate to reverse the District Court, especially in view of the fact that the determination of the District Court will not be disturbed except for an abuse of discretion.

“...after a careful review of the transcript of record including the affidavits. We are unable to say that the District Court abused its discretion in denying Appellants’ Motion. The Order of the District Court is affirmed.” *Siberell v. United States*, 9 Cir., 1959, 268 F. 2d 61.

IV-A

THE GOVERNMENT AGREES THAT THE UNQUALIFIED ORDER OF DISMISSAL OPERATES AS A JUDGMENT OF DISMISSAL WITH PREJUDICE UNDER BOTH STATE AND FEDERAL LAW.

Kuzma v. Bessemer & Lake Erie Railroad,
3 Cir., 1958, 259 F. 2d 456.

IV-B

THE GOVERNMENT AGREES THAT THE COURTS ARE LOATHE TO IMPOSE FORFEITURES, PARTICULARLY IN SITUATIONS OF DEFAULT WHERE THE EQUITIES REQUIRE TRIAL ON THE MERITS TO IMPOSE FORFEITURE.

There has been no showing here that the equities require a trial on the merits.

IV-B-1

THE GOVERNMENT AGREES THAT IF THERE WERE NEWLY DISCOVERED EVIDENCE IT WOULD BE A PROPER GROUND FOR NEW TRIAL.

Here there is no allegation of newly discovered evidence, and, therefore, even the discussion of the law is inapplicable to this matter.

IV-B-2

THE GOVERNMENT AGREES THAT RULE 60(b) SHOULD BE LIBERALLY CONSTRUED IN CASES OF FORFEITURE FOR WANT OF PROSECUTION.

Certainly there is no reason to do away with the rule entirely since it is merely a standard to be applied when some equitable consideration favorable to the Plaintiff is shown. In this type of situation it should be liberally construed, but the facts are still insufficient to substantially comply with the rule. The *Greenspahn* case quoted below discusses the type of mistake covered by Rule 60(b) (2):

"The motion to open the decree of August 10, 1949, is grounded on allegations that performance of the decree is impossible because the defendant does not have, and has never had, whiskey of the kind which the decree directs it to deliver, and that this fact was not discovered by the defendant until January 6, 1950. Rule 60(b) permits a party to be relieved from a judgment for the following reasons: '(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); *** or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.' The plaintiff's suit was started in March 1947. The defendant's answer admitting possession of whiskey called for under the court's construction of the contracts was filed on August 1, 1947. On that date and at all subsequent times the defendant's books showed the true facts about the whiskey. The slightest investigation would have disclosed them to the defendant's officer in charge of the litigation. If the motion be viewed as

based on reason (2), newly discovered evidence, it is obvious that the condition of due diligence was not met.

“If it be viewed as based on reason (1), mistake, it appears that the mistake, if any, was only that of the defendant’s officer in charge of the litigation. Because of the discretionary character of the remedy of specific performance, a unilateral mistake by the defendant will sometimes be ground for denying the plaintiff a decree for specific performance; *but if the defendant was guilty of gross carelessness in making the mistake, his negligence will dispose the court not to exercise its discretion in his favor.* In the case at bar production records were kept both in Kentucky and in the New York office; all that Mr. Friel had to do to discover the ‘mistake’ was to call in Mr. Desmond, the employee who maintains the office records of the products distilled by the defendant at its various distilleries; this he could have done at any time after the dispute with the plaintiff arose as readily as on January 6, 1950, when he did so. Mr. Friel was grossly careless for nearly three years. Negligent ignorance frequently has the same effect in law as actual knowledge. Moreover we think the defendant was chargeable with constructive notice of what the bookkeeper who kept the production records knew. Under these circumstances no equitable considerations favor the defendant. There was no abuse of discretion by Judge Abruzzo in refusing to set aside the decree on the ground of ‘mistake’.” Emphasis supplied.

Greenspahn v. Joseph E. Seagram & Sons, 2 Cir., 1951, 186 F. 2d 616, 619, 620.

CONCLUSION

In this brief the Government has confined its arguments to the factual contentions of the Plaintiffs-Appellants because the real issue in this case is a factual

one to establish whether or not, as a matter of law, the Trial Judge abused his discretion.

In their brief Appellants cite *Russell v. Cunningham*, 9 Cir., 1960, 279 F. 2d 797. That case is not applicable here because Mr. Russell was prosecuting his appeal at every stage of the proceedings. He was without funds to proceed a long distance to Guam, and could not locate the Defendant. There had also been certain material misrepresentations, coupled with the fact that the Appellant, Russell, showed good faith at every stage of the proceedings. All of these extremely unusual circumstances were recognized by this Court at page 804 of *Russell v. Cunningham, supra*. No unusual circumstances of an extenuating nature have been shown in the case at bar.

It is with reluctance that the Government feels constrained to comment on certain representations made in the brief of the Appellant against a District Court Judge who has presided on the Federal Bench approximately 25 years and on the State Bench approximately 10 years prior to that, without ever having his integrity or competency called into question. Of course judges, like other men, can make mistakes of judgment and mistakes of law; however, it is not necessary for lawyers to attack judges in any fashion except to say that they were mistaken as to the applicable law or facts. Our contention here is that the Judge has not been mistaken as to the law or facts.

The Appellants state on Page 11 of their brief:

"The District Court was most unfair in closing itself to remedy by the appellants. It was not concerned with the truth or falsity, or sufficiency with the appellants' showings, and arbitrarily, summarily, and unjustly foreclosed the appellants contrary to the express * * *."

Yet the Court stated that the Court thought it would be a good idea if the F.B.I. investigated this matter (Appendix B). Certainly this is an indication of the Court's willingness to investigate the true facts in this situation and the care with which the rights of the Appellants were examined.¹

The statement on page 20 of the Appellants' brief is completely unwarranted. Contrary to Appellants' statement on page 20, the Court did *not* rule that something "speculatively contrary" to the affidavits was true. The ruling of the Court may very well have been based on the fact that the allegations contained in the affidavit were not sufficient to qualify the Plaintiffs for relief under Rule 60(b). The allegations of Appellants (on page 20 of their brief) that it was Judge Ling's intention "... to dispense frontier justice in the nature of 15th Century adversary proceeding prevalent at one time in the British Courts, namely, the District Court wished to engage the Appellants in verbal gymnastics and slight of hand, and to spend as little time in trial session as possible.", is simply not the truth. This Court is requested to take judicial notice of the fact that Judge Ling has had a trial setting for every single day that the Court was in session, except for vacations and illness, and furthermore that the dockets in this district have been so crowded that Congress recently created another judgeship here to relieve the congestion. The Court was ready to proceed to trial, and the Court said: "Yes, I sat around waiting for these people half a day, and a jury. Were they in Phoenix that day?" (Appendix B)

1 Quite candidly the Government has inserted in its brief and appendix certain matters not in the record (Appendix A, B, and C). One of these is the excerpt from the F.B.I. report. This was necessary because the Appellants went outside the record in stating the Court did not take any additional evidence in the matter, etc. See Pages 7 and 8 of brief for appellants.

To conclude, this Court is respectfully requested to affirm the Judgment of the District Court for the reason that the District Court did not abuse its discretion and the Appellants did not then, and do not now, show a basis for relief under Rule 60(b) F.R.C.P.

Respectfully submitted,

C. A. MUECKE,

*United States Attorney for the
District of Arizona.*

SHELDON GREEN,

*Special Assistant to the
United States Attorney.
Attorneys for Appellee.*

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN A. PRICE, ET UX,
Plaintiffs

vs.

THE UNITED STATES
OF AMERICA,
Defendant

NO. CIV - 2963

WILLIAM CARL CUNNING-
HAM, ET UX,
Plaintiffs

vs.

THE UNITED STATES
OF AMERICA,
Defendant

NO. CIV - 2962

Tuesday, October 6, 1959
Ten o'clock A.M.
United States Courthouse
Phoenix, Arizona

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE DAVE W. LING, Judge

PRESENT:

For the Plaintiffs: HASH & HASH,

By MISS VIRGINIA HASH, Phoenix, Arizona

For the Defendants: MR. JACK D. H. HAYS,
U. S. Attorney

By MR. WILLIAM E. EUBANK

(Discussion was had in Chambers between Court and Counsel, at which the Court Reporter was not present.)

PROCEEDINGS

THE COURT: You may call the calendar.

THE CLERK: Civil 2962 and Civil 2963; William Carl Cunningham, et ux, vs. The United States of America; and Glenn A. Price, et ux, versus the United States of America. For trial.

THE COURT: Ready?

MISS HASH: If the Court please, at this time the counsel for plaintiff would like to move to withdraw as counsel for both parties, neither of whom are present or ready for trial.

THE COURT: All right.

MR. EUBANK: The Government is ready, your Honor.

THE COURT: All right, you may be allowed to withdraw, and judgment will be entered dismissing the case.

The Court will stand at recess, unless there is something else.

THE CLERK: No, your Honor.

THE COURT: That will be all.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN A. PRICE, et ux,
Plaintiffs

vs.

THE UNITED STATES
OF AMERICA,
Defendant

NO. CIV - 2963

WILLIAM CARL CUNNING-
HAM, et ux,
Plaintiffs

vs.

THE UNITED STATES
OF AMERICA,
Defendant

NO. CIV - 2962

Monday, February 8, 1960

11:00 o'clock A.M.

United States Courthouse

Phoenix, Arizona

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE DAVE W. LING, Judge

PRESENT:

MR. R. R. GREIVE, 4456 California Avenue,
Seattle 16, Washington,

MR. HERBERT MALLAMO, Phoenix, Arizona,

For the Plaintiffs.

MR. JACK D. H. HAYS, U. S. Attorney,

By MR. WILLIAM E. EUBANK,

For the Defendants.

PROCEEDINGS

THE COURT: You may call the calendar.

THE CLERK: Civil 2963, Glenn A. Price, et ux., vs. The United States of America; and Civil 2962, William Carl Cunningham, et ux., vs. The United States of America.

Plaintiffs' motion to vacate judgment pursuant to Rule 60, lodged 12/28/60; and defendant's motion for security for costs.

MR. GREIVE: Sir, Mr. Mallamo said he would associate with me for the purpose of trying this case.

THE COURT: All right, you may proceed.

MR. GREIVE: If your Honor please, you probably have some memory of this particular case.

THE COURT: Yes, I sat around waiting for these people half a day, and a jury. Were they in Phoenix that day?

MR. GREIVE: They were, your Honor. As I understand it, this was the pre-trial, the day before trial. Anyway, your Honor, being handicapped somewhat, not appearing at the time, and not knowing of the case, and only representing one of the parties previous to this, his lawyer in Seattle, he came to me and explained this situation.

They claim that they last saw their counsel at two o'clock the day before, and the affidavits so state, and at that time the affidavits of the desk clerk, and of the bartender, and of the woman who ran the curio shop in the Sierra Madre Motel, or hotel, contend they were sober and had their faculties.

We have affidavits, of course, from both of the two clients involved, which contend that they were conscious and had use of their faculties; and they do admit they had been drinking before.

In addition to that, we have been given an affidavit from the doctor that Mr. Cunningham, who was in considerable pain, and had been under the use of various types of drugs. We don't say he was necessarily under the use of drugs at that particular time, because the doctor can't say, but certainly the use of liquor might be for that reason in the nature of a mitigating circumstance.

Probably the most important affidavit in the whole works is one from one of the most nationally known authorities on the question of liquor and its effects, a nationally known toxicologist, a man, a professor at the State of Washington. In the state of Washington all of the fees for licenses go into research on alcohol, and they maintain quite an extensive structure, and they have this toxicologist—this toxicology laboratory.

THE COURT: What does this have to do with this?

MR. GREIVE: He has written an affidavit to the effect that if the determination was made at two o'clock on the day before, or even at 2:30, that the man would have been sober as of the following morning at ten o'clock.

In other words, he says that the effects of alcohol

at the very most could have lasted 24 hours, and would probably have been worn off in twenty hours.

My clients contend they saw no attorney, were told they could not appear, because of their condition, the following day. They say that in all sincerity. I am sure the attorney was sincere that told them they might be thrown in jail, so they were afraid to come to court.

That is what the affidavits say, and that is their position, and that was the reason for not showing; that they never came to court because they were told that they might be in trouble; and this was some twenty hours prior to the time when the motion—when the dismissal took place.

All my clients ask is that they be given the opportunity to have their case heard, and have it heard in good time.

I might add, your Honor, one of my clients is an alcoholic, but prior to this time it had been fourteen or fifteen months since he has taken a drink, but he is one of these people, if he does—The other one is not an alcoholic. He takes a drink, and that is about it.

I am saying that whatever their condition would have been at two o'clock on Monday, they felt that that shouldn't preclude them from their right of trial at ten o'clock on the following day, and their affidavits so state.

Again I say we have the affidavits of the two men involved, for whatever they are worth. We have the affidavits of the desk clerk where they asked that no drink be given to them, at two o'clock, and he would so testify.

We have the fact that the bartender was informed not to give them any drinks, and he said he didn't. They came in and ordered a 7-Up.

We have the affidavit of the woman who sold flowers and curios at that place, and the affidavit of a nationally known man who says if you are taking the determination at two o'clock Monday, by Tuesday they would have every reason to believe they would be cold sober.

THE COURT: You don't have anything to say?

MR. EUBANK: No.

THE COURT: Well, I will think this over. I found them guilty of contempt of court. I will look into that feature of it.

MR. EUBANK: One item, your Honor, and that is that both of the parties certainly knew the time set for the trial, and if you recall, the case came on—

THE COURT: I may have to get a few affidavits from their counsel. I don't know anything about it.

MR. EUBANK: If your Honor please, would you have any objection if I have the FBI investigate it?

THE COURT: No, I think that would be a good idea.

MR. GREIVE: Your Honor, does this mean that I will be informed in due course by mail?

THE COURT: The motion has been submitted.

MR. GREIVE: I needn't come back to Phoenix?

THE COURT: Oh, no.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 3rd day of June, A.D. 1961.

Jane Horswell

Appendix C

PX 120-72

ROBERT J. FOURNIER furnished the following signed statement:

“Phoenix, Arizona
March 24, 1960

“I, Robert J. Fournier, make the following voluntary statement to Gerard D. Hegstrom and George Hollingsworth who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that this statement can be used in court.

“I, Robert J. Fournier, reside at 1301 E. Virginia Avenue, Phoenix, Arizona, and I am employed as a bellman at the Sahara Hotel.

“During the first week in October, 1959, guests by the names of Cunningham and Price had stayed at the Sahara Hotel. My first contact with these individuals was when the night bellman informed me that they were drunk and that they had requested bellmen to check into their room to see that they had not fallen asleep with lit cigarettes.

“I checked in on them three or four times the first day. During the time they were at the hotel, I served

them alcoholic beverages. I also noted numerous bottles of liquor which apparently they had consumed.

“I recall on one occasion Mr. Cunningham was stretched out on the floor apparently drunk. I cannot say for sure that he was passed out but that the room smelled strongly of liquor.

“During the period they were in the Sahara I had one day off. The following day I checked them out and they both appeared to be under the influence of alcohol or in the stages of recovering from excessive consumption of alcohol. I would say that neither one was sober.

“About a month later Mr. Price returned to the Sahara.

“Mr. Gott, the room clerk, informed me that Mr. Price wanted me to sign a paper. I later learned the affidavit was to the effect that he and Cunningham were sober enough to appear in court. I did not believe this to be true. Mr. Gott left me with the impression that I would be rewarded if I would sign Price’s document.

“I talked to Mr. Casey, the manager of the Sahara Hotel and he suggested that I should not sign it if I believed the statement therein to be false.

“The next day Mr. Gott informed me Mr. Price wanted to see me in his room. I went to his room and he endeavored to get me to sign the affidavit.

“I told him I did not think the contents of the affidavit were true. I believe this was the day that they checked out in October.

“Mr. Price did not offer me a reward but I gained the impression that I could expect one if I signed the affidavit.

"I have read this four page statement and it has been read to me. This statement is true to the best of my knowledge. I have initialed all corrections.

"/s/ ROBERT J. FOURNIER

"Witnessed:

"/s/ GERARD D. HEGSTROM, Special Agent for Fed. Bureau of Invest., 3/24/60.

"/s/ GEORGE HOLLINGSWORTH, Spe. Agt. FBI, Phoenix, 3/24/60."

No. 17049

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court
for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Appellants' Reply Brief

GREIVE & LAW, *Attorneys*
R. R. BOB GREIVE
RODERICK D. DIMOFF
Attorneys for Appellants.

Seattle 16, Washington
Telephone: WEst 7-4111
4456 California Avenue Southwest



WEST SEATTLE HERALD

FILED

1961

No. 17049

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,
Appellants.

VS.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court
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Appellants' Reply Brief

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RODERICK D. DIMOFF
Attorneys for Appellants.

Seattle 16, Washington
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4456 California Avenue Southwest



WEST SEATTLE HERALD

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IN THE
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**On Appeal from the United States District Court
for the District of Arizona**

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Appellants' Reply Brief

BRIEF STRICTLY IN REPLY TO THE GOVERNMENT

The appellee has resorted to a number of improper arguments in its answering brief, injecting not only statements aimed at personally attacking and insulting counsel for their prosecution of this appeal, but gratuitous libels against the appellants themselves.

I. Denial of the appellants' motion to vacate.

A. Matters dehors the record.

Under the pretext and excuse, or claim, that the appellants went dehors the record in their brief, and not particularly in quest of the truth themselves, coun-

sel for the appellee injected Appendix "C" by way of pages 8, 32, 33 and 34 of their brief.

Appellee's brief page 8 states in part: "FBI agents were sent to investigate the truth of Appellants' affidavits but presented nothing for the Court's record and therefore in fact the Government admits the truth of the affidavits in their entirety. This is not true. The FBI did investigate the matter and made a written report, a part of which is set out in Appendix C, to the effect that Appellants' affidavits are controverted. There was no burden on the court to make the FBI report part of the record."

HOW CAN THE GOVERNMENT IN GOOD CONSCIENCE CONTEND THAT A COURT MAY CONDUCT STAR CHAMBER PROCEEDINGS AND RENDER INTELLIGENT DECISIONS DEHORS THE RECORD?

Our only knowledge of the contents of any of purported FBI report came in the appellee's brief on July 31, 1961. Not only should this court disregard Appendix C and any other "reports" which the appellee may feel tempted to inject into the record at this date, but should also, as a lesson in government doubletalk, examine the statement. It fails to make any claim that the appellants together, or either of them, were drunk on the day of trial. The said Appendix C is merely an emotional pitch to this court to damn the appellants and their counsel.

If Messrs. C. A. Muecke and Sheldon Green desire

to waive their cloak of sovereign immunity, we are very strongly tempted to advise appellant Price to institute an action for per se libel against them for having wrongly accused him of attempting to suborn perjury (Appellee's brief page 33, last paragraph).

The statement from Appendix "C" is not only objectionable as dehors the record, and out of context with the record, but is objectionable as not being under oath, and for the reason that counsel for the appellants were never apprised of its contents nor the contents of any other reports or statements, if there are in fact any "statements."

Appellants, in making their point, were attempting to let this court know that the District Court went outside the record in rendering its decision—that is, did not in any respect apprise the appellants of ANY reasons for its refusal to vacate its order of dismissal for the purpose of renoting their claims for trial. We maintain that all litigants are entitled to the courtesy of being informed of criteria upon which decisions are rendered.

It is not now within the realm of this court to retry appellants' contentions de novo. All proceedings in appellate courts are usually conducted on the record established in the trial court, and not on phony representations of counsel.

Appellants demand that appellee's Appendix "C" be expunged from the record.

B. On the question of drinking.

1. In general.

At page 15 of appellee's brief, the appellee states: "Defense of this appeal by the Government is not an attempt to name call or to further the interests of non-drinkers. The general imbibing in alcohol is not condemned here."

WHY NOT ! ? !

The only sworn testimony and statements in the record are all to the effect that the appellants were sober on the date of trial, October 6, 1959, and that they would have been present in court but for the advice of their counsel.

At page 26 of the appellee's brief, Miss Hash is quoted as saying: "If the Court please, at this time the counsel for plaintiff would like to move to withdraw as counsel for both parties, neither of whom are present or ready for trial."

From the record, it is obvious that the appellants were not present in court. However, the appellee contends, contrary to the appellants' contention, that the appellants were represented by counsel until the District Court granted Miss Hash's motion for leave to withdraw. Miss Hash's motion for leave to withdraw was purely formal—the fact of withdrawal, as shown in the appellant's affidavits, occurred on the previous day; and the appellants were not "ready for trial" in the sense that they were not represented by any member of the bar.

Miss Hash left them to fend for themselves!

2. Changing theories on appeal.

“The general rule is that a person cannot try his case on one theory in the trial court and on another theory in a court of review, whether the result in the trial court is in his favor or against him.”* The appellee, having admitted the appellants’ sobriety inferentially by having failed to produce evidence to the contrary, cannot now claim that the appellants were drunk, *Grasswick v. Miller*, 82 Mont. 364, 267 Pac. 299.

C. Adjudication with prejudice.

At page 19 of appellee’s brief, appellee claims:

“THE GOVERNMENT AGREES THAT THE UNQUALIFIED ORDER OF DISMISSAL OPERATES AS A JUDGMENT OF DISMISSAL WITH PREJUDICE UNDER BOTH STATE AND FEDERAL LAW. *Kuzma v. Bessemer & Lake Eric Railroad*, 3 Cir., 1958, 259 F. 2d 456.”

Like a pagan Roman deity who used to preside over doorways, the government speaks out of either end of its head. *Cf.*, Transcript of Record, page 228, where the government states: “Plaintiffs need only file their action again.” Where is justice when a party can say one thing to one court, and maintain a contradiction in the very same action to another court?

In conformity with *Peardon v. Chapman*, 3 Cir., 1948.

*5 C.J.S. 863-864, Appeal & Error § 1503.

169 F. 2d 909, 913, this court should reverse the District Court.

II. Abuse of discretion.

It is difficult to resist the observation that the appellee, at page 16 of its brief, did not attempt to assassinate appellant Cunningham's character. Along with the piece of wit injected by appellee, counsel for the appellant should like to point out that the appellant has never been involved in any litigation in any of the Guamanian courts!

Appellee criticizes counsel's choice of words in pointing out an abuse of discretion on the part of the District Court, and points the finger to appellants as having attacked the integrity of a member of the Federal Bench. See § 1583, Appeal & Error, 5-A C.J.S. 36-37, which states:

"An 'abuse of discretion' does not necessarily imply a bad or improper motive, a wrong purpose, willfulness, prejudice, partiality, or an intentional wrong; it is not ordinarily a term of approach, and does not mean any reflection on the presiding judge of the lower court, or carry with it an implication of conduct deserving of censure.

"In a legal sense, discretion is abused whenever, in its exercise, the court has acted arbitrarily without the employment of its conscientious judgment, has exceeded the bounds of reason in view of all the circumstances, or has so far ignored recognized rules or principles of law or practice as to result in substantial injustice. Also, discretion is abused

where manifest injustice has been done, or substantial rights lost through mere technicalities . . . ”

Appellants have a right to call the shots as they see them, and to make reasonable criticism when the occasion arises.

III. Uncontroverted affidavits.

Appellee’s reference to the attorney-client privilege is just one more example of ad hominem attempts on the appellants’ standing in their community (Appellee’s brief page 17).

IV. Inequitable and unconscionable judgments.

It is impossible to resist pointing out the glaring negative pregnant in the following statement of the appellee at page 17 of its brief:

“THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING A MANIFESTLY INEQUITABLE AND UNCONSCIONABLE JUDGMENT TO STAND.”

We maintain, as does the above statement of appellee, that the JUDGMENT was INEQUITABLE and UNCONSCIONABLE, and should not be permitted to stand, at least without reasonable investigation into the

merits of the appellants' motions or petition to vacate and set aside.

Respectfully submitted,
GREIVE AND LAW, *Attorneys*

R. R. BOB GREIVE

RODERICK D. DIMOFF
Attorneys for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CARL CUNNINGHAM, ET UX.,
and GLENN A. PRICE, ET UX.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

No. 17,049
MOTION AND
AFFIDAVIT TO
STRIKE

COME NOW the appellants and respectfully move the Court for an order striking pages 20 through 197, inclusive, from the Transcript of Record, and for an order expunging Appendix "C," pages 32 through 34, inclusive, from the Appellee's Brief.

In support of this motion, the appellants submit the following affidavit.

GREIVE AND LAW, Attorneys

By

Roderick D. Dimoff
For the Appellants

STATE OF WASHINGTON }
COUNTY OF KING } ss.

I, Roderick D. Dimoff, being first duly sworn on oath, depose and say: I am associated with the appellants' attorney of record in this appeal, and make this affidavit in support of the foregoing motion to strike and expunge portions from the record and appellee's brief.

Pages 20 through 197 of the Transcript of Record are unnecessary to an understanding of the issues in-

volved in this particular appeal, and were merely inserted into the record for the purpose of squandering taxpayers' money. As evidence of the proposition that they are unnecessary to this appeal, neither of the parties have made any reference to any of said pages anywhere in their briefs.

Appendix "C," pages 32 through 34 of the Appellee's Brief do not belong in the record of this appeal, in that the District Court has nowhere in the record indicated that it relied on the contents thereof. In addition, there are no guaranties respecting the truth of the contents nor of the authenticity of the purported document referred to in said Appendix "C."

Robert H. Hunsz

SUBSCRIBED AND SWORN TO before me this
 8 day of August, 1961.

[SEAL]

Charles J. Low

NOTARY PUBLIC in and for the State
 of Washington, residing at Seattle.

No. 17049

**United States
Court of Appeals**
for the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., AND
GLENN A. PRICE, ET UX.,

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vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
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FILED

JAN 31 1961

FRANK H. SCHMID, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
For the District of Arizona

No. Civ.-2962 Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff was siding as a passenger in a Piper Tri-Pacer airplane, owned and primarily operated by Glenn A. Price, near Sky Harbor Airport, County of Maricopa, City of Phoenix, State of Arizona.

III

That at the time and place aforesaid, the said pilot, Glenn A. Price, was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the said pilot, Glenn A. Price, to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the said pilot, Glenn A. Price, by radio communication, to change his course several times, and that the said operators by failing to notice that said pilot was in imminent danger of crashing, were careless and negligent in not directing the said pilot in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the pilot, Glenn A. Price, was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of the defendant and its agents and servants, plaintiff suffered severe injuries which caused him to be hospitalized and from which he suffered great pain of mind and body, all to his damage in the sum of Fifty Thousand Dollars (\$50,000.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant and its servants and agents, plaintiff was forced to seek medical and hospital attention and care, all to his damage in the sum of Three Thousand Dollars (\$3,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff lost many days work from his employment, all to his damage in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore plaintiffs and each of them pray judgment against the defendant as follows:

1. For damages in the sum of Fifty Thousand Dollars (\$50,000.00);
2. For medical and hospital attention and care in the sum of Three Thousand Dollars (\$3,000.00);
3. For loss of employment in the sum of Five Thousand Dollars (\$5,000.00); for their costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH

/s/ EDGAR HASH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 14, 1958.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff, William Carl Cunningham, was riding as a passenger in a Piper Tri-Pacer airplane, owned and primarily operated by Glenn A. Price, near Sky Harbor Airport, County of Maricopa, City of Phoenix, State of Arizona.

III

That at the time and place aforementioned, the said pilot, Glenn A. Price, was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the said pilot, Glenn A. Price, to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the said pilot, Glenn A. Price, by radio communication, to change his course several times, and that the said operators by failing to notice that said pilot was in imminent danger of crashing, were careless and negligent in not directing the said pilot in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the pilot, Glenn A. Price, was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of the defendant and its agents and servants, plaintiff, William Carl Cunningham, suffered severe injuries which caused him to be hospitalized and from which he suffered great pain of mind and body, all to his damage in the sum of Fifty Thousand Dollars (\$50,000.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant and its servants and agents, plaintiff, William Carl Cunningham, was forced to seek medical and hospital attention and care,

all to his damage in the sum of Three Thousand Dollars (\$3,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff, William Carl Cunningham, lost many days work from his employment, all to his damage in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore plaintiffs pray judgment against the defendant as follows:

1. For damages in the sum of Fifty Thousand Dollars (\$50,000.00);

2. For medical and hospital attention and care in the sum of Three Thousand Dollars (\$3,000.00);

3. For loss of employment in the sum of Five Thousand Dollars (\$5,000.00); for their costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH

/s/ By EDGAR HASH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 29, 1958.

In the United States District Court
for the District of Arizona

No. Civ-2963 Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Now Come the plaintiffs by and through their attorneys, Hash & Hash, and for cause of action against the defendant, allege:

I

This action is brought under the Federal Tort Claims Act, 28 USC Sec. 1346(b), 2671 et seq. as hereinafter more fully appears. Plaintiffs are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00).

II

That on or about the 18th day of October, 1956, during the nighttime of said date, plaintiff, Glenn A. Price, was flying a Piper Tri-Pacer airplane, owned by plaintiff, near Sky Harbor Airport in the County of Maricopa, City of Phoenix, Arizona, and was attempting to land said aircraft on the aforesaid airfield.

That plaintiff had left El Paso, Texas on a flight to Phoenix, Arizona. That upon approaching Phoenix, Arizona, plaintiff called the control tower at Sky Harbor Airport, Phoenix, by radio, and requested landing instructions. That the operators of the Civil Aeronautics Administration Control Tower at Sky Harbor Airport, Phoenix, Arizona then issued radio instructions to plaintiff, directing him to the airport. That plaintiff told the tower operators he could not see Sky Harbor Airport.

III

That at the time and place aforementioned, the plaintiff was in radio communication with operators of the control tower at the said Sky Harbor Airport and had received several messages from said tower and was following the directions issued by the said operators of the said tower. That at the time and place above mentioned, the said operators of the said tower were regularly in the service and employ of the Civil Aeronautics Administration of the defendant, The United States of America, and they were acting within the scope of their office or employment.

IV

That the said operators undertook to assist the plaintiff to make a safe landing, and having so undertaken, acted in a careless and negligent manner, in that the said operators directed the plaintiff, by radio communication, to change his course several times, and that the

said operators, by failing to notice that plaintiff was in imminent danger of crashing, were careless and negligent in not directing plaintiff in a proper manner.

V

That because of the careless and negligent conduct of the said operators, the plaintiff was misled and deceived into landing the aircraft short of the runway, all as a direct result of following instructions issued by the aforesaid tower operators, and resulting in injuries and damages as hereinafter specifically set out.

VI

That as a direct result of the aforesaid negligent and careless conduct and course of action of defendant and its agents and servants, the plaintiff's airplane was destroyed, to his damage in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00).

VII

That as a direct result of the aforesaid negligent and careless acts of the defendant, plaintiff was severely injured in and about his body, including a broken rib and broken jaw, and has been forced to undergo plastic surgery and other medical and hospital care, all to his damage in the sum of One Thousand Dollars (\$1,000.00).

VIII

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff lost many days from

his employment, all to his damage in the sum of Six Thousand Dollars (\$6,000.00).

IX

That as a result of the aforesaid negligent and careless acts of the defendant, plaintiff has suffered great suffering and pain of body and mind, to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore plaintiff prays judgment against the defendant as follows:

1. For destruction of plaintiff's airplane in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00);

2. For medical and hospital care in the sum of One Thousand Dollars (\$1,000.00);

3. For loss of employment in the sum of Six Thousand Dollars (\$6,000.00);

4. For damages in the sum of Ten Thousand Dollars (\$10,000.00); for his costs herein incurred, and for such other and further relief as is just and proper in the premises.

HASH & HASH

/s/ By EDGAR HASH,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 14, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ANSWER OF DEFENDANT
UNITED STATES OF AMERICA

Comes Now, the Defendant, United States of America, and for its answer to Plaintiffs' Amended Complaint alleges, denies and admits as follows:

I

Defendant admits the first sentence, paragraph numbered I of Plaintiffs' Complaint.

II

Defendant denies each and every other allegation in the Plaintiffs' Complaint for it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs II through VIII, and the last two sentences of Paragraph I.

First Defense

The Complaint fails to state a claim against the Defendant upon which relief can be granted.

Second Defense

The damages alleged in the Complaint were proximately caused or contributed to by the negligence and carelessness of the Plaintiffs.

Third Defense

The damages alleged in the Complaint were the result of an unavoidable accident.

Fourth Defense

The so-called negligent acts alleged by the Plaintiffs in their Complaint constitute acts within the discretionary function or duty exception of the Federal Tort Claims Act, (28 U.S.C., Section 2680(a)), and as such is an improper claim over which this Court lacks jurisdiction.

Fifth Defense

The Plaintiffs assumed the risk of the alleged airplane crash, set out in the Complaint, by flying, and by flying in the nighttime, with an unqualified pilot.

Wherefore, Defendant demands judgment.

JACK D. H. HAYS,
United States Attorney,
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

Receipt of a copy of the foregoing Answer acknowledge this 30th day of December, 1958.

HASH & HASH,
/s/ By VIRGINIA HASH,
Attorneys for the Defendants.

[Endorsed]: Filed Dec. 30, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER OF DEFENDANT
UNITED STATES OF AMERICA

Comes Now, the Defendant, United States of Amer-
ica, and for its answer to Plaintiffs' Complaint alleges,
denies and admits as follows:

I

Defendant admits the first sentence, paragraph num-
bered I of Plaintiffs' Complaint.

II

Defendant denies each and every other allegation in
the Plaintiffs' Complaint for it is without knowledge or
information sufficient to form a belief as to the truth
or falsity of the allegations contained in Paragraphs II
through IX, and the last sentence of Paragraph I.

First Defense

The Complaint fails to state a claim against the De-
fendant upon which relief can be granted.

Second Defense

The damages alleged in the Complaint were proximately caused or contributed to by the negligence and carelessness of the Plaintiffs.

Third Defense

The damages alleged in the Complaint were the result of an unavoidable accident.

Fourth Defense

The so-called negligent acts alleged by the Plaintiffs in their Complaint constitute acts within the discretionary function or duty exception of the Federal Tort Claims Act, (28 U.S.C., Section 2680(a)), and as such is an improper claim over which this Court lacks jurisdiction.

Fifth Defense

The Plaintiffs assumed the risk of the alleged airplane crash, set out in the Complaint, by flying and by flying in the nighttime.

Wherefore, Defendant demands judgment.

JACK H. HAYS,

United States Attorney

/s/ WILLIAM E. EUBANK,

Assistant U. S. Attorney.

Receipt of a copy of the foregoing Answer acknowledged this 15th day of December, 1958.

HASH & HASH,

Attorneys for the Defendants.

/s/ By VIRGINIA HASH

[Endorsed]: Filed Dec. 15, 1958.

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MOTION TO CONSOLIDATE FOR TRIAL
AND NOTICE

(Rule 42 F.R.C.P.)

Defendant moves the Court to consolidate for trial the above entitled action with Glenn A. Price and Jane Doe Price, husband and wife, No. Civ. 2963-Phx., United States District Court for the reasons that each cases involves common questions of law and fact, and that a consolidation of these cases for trial will avoid unnecessary costs and delay, all as provided in Rule 42(a), F.R.C.P.

This Motion is based upon the affidavit attached hereto.

HACK H. HAYS,

United States Attorney,

/s/ WILLIAM E. EUBANK,

Assistant United States Attorney

NOTICE

TO: Hash & Hash
Attorneys at Law
412 Arizona Savings Building
Phoenix, Arizona

Please Take Notice that Defendant will cause the foregoing Motion to be heard before the United States District Court, Federal Court House, Phoenix, Arizona, on January 12, 1959 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel for the Defendant may be heard.

Dated this 31st day of December, 1958.

JACK D. H. HAYS,
United States Attorney,
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 31, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, January 19, 1959, at Phoenix Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

Plaintiffs' Motion to Set for Trial and Plaintiffs' Motion to Consolidate Civ-2962 Phoenix with Civ-2963 Phoenix for trial are called for hearing this day. Edgar Hash, Esq. appears for the plaintiff. Wm. Eubank, Esq., Assistant United States Attorney, is present for the Government.

It Is Ordered that cases Nos. Civ-2962 and Civ-2963 Phx. are set for trial Tuesday, October 6, 1959 at 10:00 o'clock a.m., and that said cases be consolidated for trial.

In the United States District Court
For the District of Arizona

(Consolidated for Trial)

No. Civ-2963-Phx

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION UPON ORAL EXAMINATION OF
THOMAS J. McINTYRE, D.D.S.

Seattle, Washington

August 7, 1959

Carl A. Gibson

Court Reporter

Tacoma, Washington

In the United States District Court for the District
of Arizona.

Glenn A. Price and Jane Doe Price, husband and
wife, Plaintiffs. Hash & Hash; by Virginia Hash. and

Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

William Carl Cunningham and Vera Mae Cunningham, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

No. Civ-2963-Phx and No. Civ-2962-Phx.

Deposition upon Oral Examination of Thomas J. McIntyre, D.D.S. [1]*

Be It Remembered, that pursuant to an oral stipulation by and between counsel and on Friday, August 7, 1959, at the hour of 1:45 o'clock P.M., at Room 403, Stimson Building, Seattle, Washington, before me, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, Washington, personally appeared Dr. Thomas J. McIntyre, a witness herein, produced as a witness at the instance of the Plaintiffs, having been first duly sworn, was thereupon examined and interrogated as a witness in the above-said cause.

*Page number appearing at bottom of Original Deposition.

The parties being represented by their respective attorneys as follows:

Virginia Hash, Attorney at Law, of the Phoenix, Arizona Law Firm of Hash & Hash, and Robert M. Reynolds, Attorney at Law, of the Tacoma, Washington Law Firm of Metzger, Blair & Gardner, appeared on behalf of the Plaintiffs.

John S. Obenour, Attorney at Law, and Assistant United States Attorney, appeared on behalf of the Defendant.

Whereupon, the following proceedings were had and testimony taken, to wit:

Mr. Reynolds: Let the record show that this deposition is being taken pursuant to the [2] same stipulations as was the prior deposition of Dr. Ramaker.

DR. THOMAS J. McINTYRE

having been first duly sworn upon oath, was called as a witness at the instance of the Plaintiffs and testified as follows:

Direct Examination

By Miss Hash:

Q. Would you state your full name, Doctor?

A. Thomas J. McIntyre.

Q. And would you tell us your occupation, please?

A. Oral Surgeon.

Q. And would you tell us some of your background as far as your education and training is concerned?

A. Yes. I graduated from Northwestern University with a Bachelor of Science degree and a degree in Oral Surgery in 1948. I spent one year at the King

(Deposition of Dr. Thomas J. McIntyre.)

County Hospital in Seattle, and I spent three years in the Navy, one year at the Bremerton Navy Hospital.

Q. As a dentist?

A. Yes, as an oral surgeon, and I have been continuously in Seattle since 1951.

Q. Have you taken any specialized courses in your profession? [3]

A. Oh, routine annual refresher courses which usually are given through the universities and they last over a period of two weeks to a month.

Q. Are you acquainted with a man by the name of Glenn A. Price? A. I am.

Q. When did you first become acquainted with Mr. Price?

A. I first saw Mr. Price on the 25th of October, 1956.

Q. Was that as a patient of yours? A. Yes.

Q. And did you examine him at that time?

A. I did.

Q. And what did you find from your examination?

A. Well, Mr. Price was referred to me from the neuro-surgeon who treated him apparently in Arizona following an alleged accident in an aircraft there. He was referred from the neuro-surgeon in Arizona to the Virginia Mason Clinic who in turn referred him to me for post-operative care following this fractured jaw he sustained in Arizona. When I saw him he had facial lacerations and inter-oral lacerations, and subsequent X-rays showed a sub-condylar fracture.

Q. Would you describe for us, please, where you found the lacerations?

(Deposition of Dr. Thomas J. McIntyre.)

A. I don't have a record on the external lacerations. The [4] inter-oral lacerations were referred to the retro-molar area.

Q. Now, translating that into laymen's language, Doctor, can you tell us what you mean by "retro-molar"?

A. Behind the back teeth.

Q. All right. A. The lower back teeth.

Q. Would that be on both sides of the jaw?

A. Yes.

Q. All right. And what else did you find?

A. He also, as I mentioned, had a sub-condylar fracture with minimal displacement below the left mandible condyle.

Q. It was on the left side that he had the fracture?

A. According to my records and according to the films I have, that would be correct.

Q. You are now examining some X-ray films?

A. I am.

Q. Did you take those X-ray films?

A. No, he was referred to Dr. Homer Hartzell in this (Stimson) building for suitable X-rays.

Q. You referred him to Dr. Hartzell?

A. I referred him for these, yes, for the X-rays.

Q. You have those X-rays in your possession at this time, Doctor?

A. Yes, they are dated 10-25-56. [5]

Q. Now, in examining the X-rays, were they all taken from the same point of view?

A. No. There are three different views, four different views, excuse me; a posterior-anterior view, right and left oblique views, and a Waters' view to obviate

(Deposition of Dr. Thomas J. McIntyre.)

any fractures of the upper jaw as well as the bilateral temporal mandibular joint.

Mr. Obenour: Let the record show that we object to the doctor testifying from the X-rays for the reason that they were taken by Dr. Hartzell rather than by the doctor.

The Witness: I beg your pardon?

Mr. Reynolds: That is all right, Doctor. He is putting his objection in to the record. You don't have to pay any attention to it.

By Miss Hash:

Q. Now,—(interrupted)

Mr. Obenour: (Interrupting) The objection will also go to the testimony as to the contents of the X-rays themselves.

Miss Hash: All right.

By Miss Hash: [6]

Q. From your examination of Mr. Price then did you undertake to treat Mr. Price for his fractured mandible?

A. Well, this type of fracture is one that responds very nicely to conservative treatment inasmuch as there was no displacement. And the treatment for a subcondylar fracture usually is more involved than the problem itself. Inasmuch as there was no displacement we felt the best thing to do would be to have full new dentures constructed for him to maintain a normal relationship between his upper and lower jaw. He was referred to Dr. Ramaker for that purpose.

Q. How many times did you see Mr. Price in your office? A. I saw Mr. Price four times.

(Deposition of Dr. Thomas J. McIntyre.)

Q. Four times?

A. Yes, over a period from the 25th of October to the 27th of November of '56.

Q. That was before he acquired the new dentures?

A. No, I saw him the last visit. After I had seen him he had his new dentures.

Q. All right. Now, back to the first time he came in, did you give him any treatment at that time in addition to having the X-rays made?

A. We removed the sutures from the lacerations.

Q. Could you tell us how many sutures were removed? A. I have no record. [7]

Q. And the second time that you saw him, what treatment did you give him?

A. Purely observation.

Q. Was there any further care that you gave him at that time? A. No.

Q. Was there any further care that you gave him at any subsequent visit?

A. No. No, we gave him no further definitive care.

Q. All right. Now, Doctor, what was your charge to Mr. Price for the care that you gave?

A. Our total charge was \$35.00.

Q. And has that charge been paid?

A. Yes, that was paid on 2-21-57.

Q. By Mr. Price?

A. Apparently. I have no record. All I know is that it was paid.

Q. Have you seen Mr. Price since?

A. I have no record of having seen him since.

(Deposition of Dr. Thomas J. McIntyre.)

Q. Could you determine from your examination what caused the lacerations in Mr. Price's mouth?

A. No, not precisely. Certainly the lacerations he sustained would be consistent with the type of accident that he described. As I remember, he told me that he was wearing his dentures at the time of the accident and that they were shattered by the impact. The lacerations he had in his mouth would be consistent with that type of injury.

Q. That is from the dentures breaking; is that correct? A. Yes.

Q. In other words then, he had his teeth removed at some time prior to the accident and was wearing dentures? A. Yes.

Q. There were no signs of any teeth having been recently removed from his mouth?

A. Well, it depends on what you mean by "recently". I would say certainly that within the last six months, no.

Miss Hash: That is all.

Mr. Reynolds: Do you have any questions, Mr. Obenour?

Cross-Examination

By Mr. Obenour:

Q. What do you mean by "displacement"?

A. Relative to a fracture?

Q. Yes?

A. Well, of course when a bone is fractured and if there is any break in the continuity of the bone, then that is referred to as a displacement. In other words, if there is any break in the continuity of the bone and it

(Deposition of Dr. Thomas J. McIntyre.)

[9] is fragmented somewhat apart, that is referred to as a displacement.

Q. But there was no displacement in this instance?

A. Minimal displacement.

Q. So that the characteristics, the facial characteristics, had not been affected by this fracture from your observation?

A. No, I have no really definite record on that, but I would certainly be surprised if, from this type of fracture, he did have any facial derangements. I don't remember any certainly.

Q. The only treatment you gave him was consistent with the removal of the sutures? A. Right.

Q. What was the purpose for which the sutures had been placed?

A. Well, there again, of course, I would have to rely on the information supplied me, which was that he sustained lacerations.

Q. The sutures were for the lacerations rather than any work done upon the fracture? A. Yes.

Q. Was there by any type of a mechanical device to retain the mouth by reason of the fracture, or was it simply healing without any type of braces or anything of that sort? [10]

A. I have no record that he had any appliances. As I remember, he was wearing no appliance when I saw him. He may have been wearing a head cap which frequently people do, which is a very simple appliance and requires no type of fixation.

Q. A cap—, what?

A. Well, actually it's primarily a sling. It consists

(Deposition of Dr. Thomas J. McIntyre.)

of a piece of muslin cloth which goes over the top of the crown of the head and then is attached by some type of suspension, either a rubber band or string or new shoe laces, and it is a sling that goes under the jaw, which gives support.

Q. You don't recall or don't know whether in fact he had such a sling?

A. I really don't remember.

Q. But other than that possibility, there was no other appliance that was used? A. No.

Q. And the injury then, in your treatment, was from the lacerations which you were told was from other dentures?

A. Well, the inter-oral ones, as I understand it, were from the dentures which he told me shattered at the time of the accident. The ones on his face he told me he sustained when he hit whatever he hit inside the aircraft.

Q. So then the restoration of the dentures, from your [11] observation and treatment, would be that his mouth would be in the same condition as it was prior to the dentures being replaced?

A. Well, there again, of course, it takes six to eight weeks for a fracture of this type to heal on an average. I saw him exactly a month after his accident, so he still had a two or three week period of grace following the time I saw him in the insertion of his dentures for that fracture to have slipped. And whether or not it did, I have no idea.

Q. I see.

A. I would assume that if he had any difficulty, he

(Deposition of Dr. Thomas J. McIntyre.)

would have contacted me because that was the stipulation that we had. At any rate, I stopped seeing him.

Q. So the installation of new dentures would have restored his mouth to the condition it was prior to the injury?

A. That usually is what happens in these cases.

Mr. Obenour: I believe that is all.

Miss Hash: That is all.

Mr. Reynolds: Doctor, thank you very kindly.

(Whereupon, the witness was excused.) [12]

Certificate

State of Washington, County of Pierce—ss.

I, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, in said County and State do hereby certify:

That the annexed and foregoing deposition upon oral examination of the witness, Dr. Thomas J. McIntyre, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting by me; said deposition being taken in Room 403, Stimson Building, Seattle, Washington, on Friday, August 7, 1959.

I further certify that the said witness and the parties hereto waived the reading and signing by said witness of his testimony after same was fully transcribed.

I further certify that all objections made at the time of said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said oral examination.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any [13] such attorney or counsel, and that I am not financially interested in said action, or the outcome thereof.

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth.

I further certify that said deposition upon oral examination is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 13th day of August. A. D. 1959.

/s/ CARL A. GIBSON,

Notary Public in and for the
State of Washington, residing
at Tacoma.

[Seal]

My commission expires May 23, 1960. [14]

[Endorsed]: Filed Aug. 17, 1959.

In the United States District Court
For the District of Arizona

(Consolidated for Trial)

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife.

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DEPOSITION UPON ORAL EXAMINATION OF
RAY EDWARD RAMAKER, D.D.S.

Seattle, Washington

August 7, 1959

Carl A. Gibson

Court Reporter

Tacoma, Washington

In the United States District Court for the District
of Arizona.

(Consolidated for Trial.)

Glenn A. Price and Jane Doe Price, husband and
wife, Plaintiffs, Hash & Hash; by Virginia Hash, and

Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistnat U. S. Attorney, Attorney for Defendant.

William Carl Cunningham and Vera Mae Cunningham, husband and wife, Plaintiffs, Hash & Hash; by Virginia Hash, and Robert M. Reynolds of Metzger, Blair & Gardner, Attorneys at Law, Attorneys for Plaintiffs.

vs.

The United States of America, Defendant, John S. Obenour, Attorney at Law, and Assistant U. S. Attorney, Attorney for Defendant.

DEPOSITION UPON ORAL EXAMINATION
OF RAY EDWARD RAMAKER, D.D.S. [1]

Be It Remembered, that pursuant to an oral stipulation by and between counsel and on Friday, August 7, 1959, at the hour of 1:15 o'clock P.M., at Room 403, Stimson Building, Seattle, Washington, before me, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, Washington, personally appeared Dr. Ray Edward Ramaker, a witness herein, produced as a witness at the instance of the Plaintiffs, having been first duly sworn, was thereupon examined and interrogated as a witness in the above-said cause.

The parties being represented by their respective attorneys as follows:

Virginia Hash, Attorney at Law, of the Phoenix, Arizona Law Firm of Hash & Hash, and Robert M. Reynolds, Attorney at Law, of the Tacoma, Washington Law Firm of Metzger, Blair & Gardner, appeared on behalf of the Plaintiffs.

John S. Obenour, Attorney at Law, and Assistant United States Attorney, appeared on behalf of the Defendant.

Whereupon, the following proceedings were had and testimony taken, to wit:

Miss Hash: Let the record show that there are two cases in this matter and that [2] originally they were filed as two separate cases, one being designated as Civil No. 2962-Phoenix, Cunningham versus U.S.A., and one Civil No. 2963-Phoenix, Price versus U. S., and they have been consolidated for trial.

Mr. Reynolds: Mr. Obenour, do you think we should take any stipulation with regard to the time and place of taking this deposition?

Mr. Obenour: It is agreeable with me, whatever you want.

Mr. Reynolds: Well, all right, let the record show in addition that the notice of time and place is waived by Attorney for the Government, Mr. Obenour, and Miss Hash and myself as the two attorneys for the Plaintiff.

Miss Hash: I think we should further stipulate at this time, if it is agreeable to you two gentlemen, that the taking of the deposition will be recessed until a later time to permit the doctor's subsequent examination.

Mr. Reynolds: All right. [3]

Mr. Obenour: That is agreeable.

Miss Hash: Off the record a minute.

(Whereupon, a discussion was had off the record.)

Mr. Reynolds: This deposition is to be used at the time of trial so the normal procedures shall be followed, and the original of the deposition will be mailed to the Clerk of the Court in Phoenix, Arizona.

DR. RAY EDWARD RAMAKER,

having been first duly sworn upon oath, was called as a witness at the instance of the Plaintiffs, and testified as follows:

Direct Examination

By Miss Hash:

Q. Would you state your full name, please, Doctor? A. Ray Edward Ramaker.

Q. And what is your occupation?

A. Dentist.

Q. You are, I take it, licensed to practice dentistry in the State of Washington? A. I am.

Q. Are you licensed in any other States? [4]

A. Yes, Minnesota and Montana.

Q. Would you tell us something about your educational background and your specialty, if you have any?

A. Well, I graduated from highschool. Do you want to know when? Well, that was in 1911. I went to normal business school for two years and business Dentistry in the University of Minnesota during a part college also from 1912 to 1913, and to the School of of '13, '14 and '15, when I graduated. I taught there for two years.

(Deposition of Dr. Ray Edward Ramaker.)

Q. What did you teach, Doctor?

A. Prosthetics. That is denture work. I was in the Army then for 26 months. I don't know the dates. I was discharged and went out to Montana in '19.

Q. Excuse me just a moment. Did you practice dentistry in the Army? A. Yes.

Q. And did you have a rank?

A. 1st Lieutenant.

Q. Thank you, go ahead.

A. I practiced in Hobson, Montana, for about four years, and then I went to Missoula and practiced there for about five years, and then moved here. Then I started my specialty out here.

Q. You specialized in only dentures?

A. That is right. [5]

Q. And have you had any specialized training in addition to what you have already told us?

A. Oh, yes. I went back to the University of Minnesota on two different occasions and took up post-graduate work back there. And then I have taken study courses out here, two of them.

Q. And you have practiced, then, right here in Seattle ever since that time?

A. About 18 years.

Q. Now, do you know a man by the name of Glenn A. Price? A. Yes.

Q. When did you first become acquainted with Mr. Price?

A. December 10th, 1956.

Q. And what was the occasion for your acquaintance with him?

(Deposition of Dr. Ray Edward Ramaker.)

A. He was referred to me by Dr. McIntyre for dentures.

Q. And did he come to you then for his dentures?

A. Yes.

Q. Would you tell us what your treatment was of Mr. Price?

A. Well, now, actually it was a similar procedure that you do on any of the denture work. He was in here five times while we were doing the impression work. Also, I examined the X-rays the day that he came down here. I went up to the office and seen them and I noticed the fractures. I have forgotten what they were now, and we simply went [6] through the usual procedure with the impression work. I did caution him at that time that until his mandible closes will be necessary for him to have a complete set of upper and lower dentures in a few years.

Q. Now, when you first examined him, Doctor, did you discover the fracture in his jaw?

A. No, only to the extent that the sutures had been removed just shortly before, and I knew from that that surgery had been done.

Q. You could tell that sutures had been removed?

A. Oh, yes.

Q. From what portion of his jaw?

A. Oh, now, there you go. I couldn't tell you exactly now, I'm sorry.

Q. Do you recall—(interrupted)

A. (Interrupting) Dr. McIntyre would know that for sure.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Do you recall which side the jaw was fractured on?

A. Both sides. Am I wrong on that? I have forgotten. I get so many of these things, I don't recall unless I have the actual X-rays in my office.

Q. Did you take the X-rays yourself?

A. No, they were taken by Dr. Hartzell.

Q. Was that at the direction of Dr. McIntyre?

A. That is right.

Q. Dr. McIntyre had caused the X-rays to be taken? [7]

A. That is right.

Q. And did you notice anything else in his mouth or jaw at that time besides the removal of the sutures?

A. All I can actually remember at that time is that in palpating the mouth I was able to discern that the gums were swollen at one or two points, but as to that, I cannot be sure.

By Mr. Reynolds:

Q. What would that indicate?

A. Well, simply inflammation from the injury and that it was not a full closure of the bone as yet.

By Miss Hash:

Q. Did you fit him with dentures at that time?

A. Yes, he received the dentures on the 20th of December, '56, ten days later.

Q. And is it a proper practice to fit a person with dentures when there is not a complete closure of the bone?

A. It is better, yes, because they act or if there is no particular pressure placed there, why, there is a sort of a split there. I don't know, the healing is better,

(Deposition of Dr. Ray Edward Ramaker.)

but if it is open,—no, I mean if there is a big space there, we wouldn't do that.

Q. There was, then, no big space?

A. Not that I saw. [8]

Q. Now, you stated that he, in any event, would probably have to have another set of dentures?

A. Yes.

Q. Would you explain that?

A. Well, in normal fractures of the mandible, as the closure takes place, it is somewhat similar to adhesion tissue after a tonsilectomy. There is a pulling in of the jaw, and very frequently as the jaw heals it causes a contraction of the mandible on the other side, which diminishes it in actual size as it does that. Whatever dentures are resting in there then fails to come together with the upper denture. It is changing the shape and it is turning back.

Q. Does that cause any difficulty in the use of the mouth?

A. Yes.

Q. Would you tell us what that difficulty is?

A. Well, it's just not—at first he probably wouldn't know that at all for a year, a year and a half or maybe two years, and that is simply that the biting surface is partially obliterated by the incorrect position of the cusps of the teeth.

Q. Would a condition of that kind cause pain or suffering?

A. I doubt if it causes any particular pain, but he gets some awful sore spots on the lower denture.

Q. In other words, sore spots on his gum? [9]

A. Yes.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Can that condition be corrected?

A. It can by relieving him of his lower dentures for possibly a week and then start on a new impression.

Q. Making new dentures? A. Yes.

Q. Both uppers and lowers?

A. Yes, you have to. The lower teeth are set forward, you see.

Q. I see.

A. Now, Doctor, would you tell us what the cost has been to Mr. Price for your care?

A. Yes, I charged him \$250.00. I didn't know whether they were going to make any kind of a deal on this insurance, so I made him a little discount of \$8.00 on it. He paid me \$242.00.

Q. And that is the total bill to date; is that correct? A. Yes, all paid.

Q. All right. Now, it is your intention to see Mr. Price again to determine whether or not he has this difficulty that you were speaking of?

A. If it is necessary, yes. He is coming in—he didn't say when—but he told me he was coming in.

Miss Hash: I have no further questions.

Mr. Reynolds: Do you have any questions, Mr. [10] Obenour?

Cross-Examination

By Mr. Obenour:

Q. You were paid by Mr. Price?

A. Yes, in two checks. He gave me one on the 10th and another one on the 20th.

Q. You were paid by him? A. Yes.

(Deposition of Dr. Ray Edward Ramaker.)

Q. What was his occupation?

Mr. Reynolds: This is off the record.

(Whereupon, a discussion was had off the record.)

By Mr. Obenour:

Q. Your work has been restricted to the preparation of dentures then, Doctor, rather than a general practice of dentistry?

A. Yes. I do no general practice at all.

Q. And you did no work for Mr. Price in the treatment for any injuries? A. No, sir.

Q. Strictly the preparation of the dentures?

A. Yes, sir.

Q. From your examination of his mouth, were you able to [11] tell whether or not he had previously worn dentures? A. I do not recall.

Q. Do you recall the condition of his mouth at the time you first examined him on December the 10th?

A. To some extent, yes, sir.

Q. Now, you say that there were indications that sutures had been removed; was that the sutures that would be attendant on the removal of teeth or would that be sutures that were removed as a result of the accident?

A. That was a surgical procedure from the accident.

Q. A surgical procedure for what, could you tell?

A. For the fracture of the mandible.

Q. How did you know that there was a fracture of the mandible?

A. He told me. Then I got one of the X-rays and looked at it.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Your information was from what you were told by Mr. Price and from the examination of the X-rays taken at Dr. McIntyre's instigation?

A. Yes, that is right.

Q. And you do not recall what those fractures were?

A. I do not exactly, no, sir, I'm sorry.

Q. Now, when you referred to or I believe you said that there were two sore spots in the mouth, was that restricted to the fractures? [12]

A. Yes, I believe it was because I know or I remember just vaguely about it, but when I palpated the lower mouth I found tenderness there in two places where the tissue was elevated somewhat and that was partially on the fracture or at least it was against the sutures.

Q. Had it been required for the teeth to be removed, would the mouth not have shown whether or not there had been teeth removed or whether it was a mouth that had worn dentures previously?

A. Some extractions had been made previously. I don't recall.

Q. But it would show?

A. There is another thing there, sutures would pretty well cover up the source of extraction. You see, where the sutures were, that may have been the result of the operative interference to correct that mandible. It could have been that, I just don't know. I know I didn't see any wire in the mandible as though they had wired it together at that time on either side. No X-rays showed that at all.

(Deposition of Dr. Ray Edward Ramaker.)

Q. Your experience then with Mr. Price has been restricted to the post-accident period exclusively?

A. Yes, sir.

Q. Now, if he in fact had worn dentures prior to the accident, the only damage to the teeth would be that involved [13] with the replacement of those dentures; would that be correct, as contrasted to the loss of any other teeth or anything of that sort?

A. Well, from what you are asking, all I know is that I can't give you anything except I saw the edentulous mouth. What he had prior to that, I do not know.

Q. And so that the treatment that you gave him was the preparation of dentures at a time when the jaw was still in a healing process?

A. It would be so, yes.

Q. And in your opinion, that is the proper procedure to fit for dentures?

A. By all means.

Q. When you say "closure" do you mean the closure of the bone or the closure of the gums?

A. Well, in part, the closure of the bone as due to the healing process. It brings the two severed parties together. Now, the other answer would be, closure normally in denture work indicates a closure between the upper and lower jaw.

Q. I see.

A. If you have a long time with the lower teeth or the upper teeth out, you get a closure or, I mean, your jaw comes together mostly like this (indicating and demonstrating). [14]

Q. You speak of a closure then, just to make sure that I understood you, when there is a closure, that is

(Deposition of Dr. Ray Edward Ramaker.)

involved in the bite rather than in the bones of the jaw? A. No, the bone at that time.

Q. The bones at that time?

A. Yes. No, this was the bones at that time, or I should say the bone.

Q. And at this time you are unable to say what would be the degree of change in the bite from the time that you first saw him and fitted him with dentures to the present time?

A. No, it's the same thing.

Q. I mean,—(interrupted)

A. (Interrupting) Well, there's a pattern there all right.

Q. A pattern such as a matter of knowing that you can anticipate other than fitting the actual teeth? Is there a difference that you can say? What is the actual change that we would be referring to?

A. There is a pattern there all right on this other closure that I mentioned. I know or I mean in fact that the jaw has closed. I mean the mandible condyles have gone up.

Q. And that is the change then? A. Yes.

Q. Is that of the bite and the closure of the jaws?
[15]

A. That is right.

Q. So that the biting surface of the teeth are changed? A. That is right. Well, yes.

Q. Would that change his appearance?

A. Oh, yes, it would.

Q. To what degree?

A. Well, if you left this absolutely alone—you see, I haven't seen this man recently, I'm guessing.

(Deposition of Dr. Ray Edward Ramaker.)

Q. All right, sir.

A. I am stating what he told me on the telephone.

Q. Well, rather than guessing, you are going to see him again, are you not?

A. Yes. With the lower jaw and if there is a closure and that mandible comes out, I can only express it in this way. Everyone of you people have seen men and women my age and you see them on the street and they look like they are very sulky. The jaw sits way out like that (indicating and demonstrating), you see what I mean?

By Miss Hash:

Q. It caused his lower jaw to stick out forward; is that right, Doctor?

A. Yes. That is the biggest contention that we have in dentistry today, and that is the closure.

By Mr. Obenour: [16]

Q. What would be the effect of the additional dentures then?

A. Well, the only thing you can do now that he has got a complete healing process is that he certainly should have new dentures made. They should last him for many, many years.

Q. What effect will the new dentures then have on his appearance. A. It should improve it.

Q. Will the new dentures correct the bite?

A. It would have to.

Q. Then it would return to what it would normally be?

A. It won't return to exact normal, no, sir. It simply sets the teeth in a position to effect a normal biting.

(Deposition of Dr. Ray Edward Ramaker.)

Mr. Obenour: I don't have anything else now until after the continuation.

Miss Hash: I think that is all until the continuation.

(Whereupon, the witness was excused.) [17]

Certificate

State of Washington, County of Pierce—ss.

I, Carl A. Gibson, Notary Public in and for the State of Washington, residing at Tacoma, in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of the witness, Dr. Ray Edward Ramaker, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting by me; said deposition being taken in Room 403, Stimson Building, Seattle, Washington, on Friday, August 7, 1959.

I further certify that the said witness and the parties hereto waived the reading and signing by said witness of his testimony after same was fully transcribed.

I further certify that all objections made at the time of said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said oral examination.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney [18] or counsel, and that I am not financially interested in said action, or the outcome thereof.

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth.

I further certify that said deposition upon oral examination is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 13th day of August, A. D. 1959.

[Seal]

/s/ CARL A. GIBSON,

Notary Public in and for the
State of Washington, residing at
Tacoma.

My commission expires May 23, 1960. [19]

[Endorsed]: Filed Aug. 17, 1959.

In the United States District Court
For the District of Arizona
No. Civ. 2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REQUEST FOR ANSWERS
TO INTERROGATORIES

To the above-named Plaintiffs, Glenn A. Price and
Jane Doe Price, husband and wife, c/o Messrs.
Hash & Hash, Attorneys at Law, 412 Arizona Sav-
ings Building, Phoenix, Arizona:

You Are Hereby Notified to answer under oath the
interrogatories numbered from 1 to 17, inclusive, as
set out hereafter, within fifteen (15) days of the time
service is made upon you in accordance with Rule 33 of
the Federal Rules of Civil Procedure.

Interrogatory No. 1

State the residence address of plaintiffs Glenn A.
Price and Jane Doe Price (hereinafter addressed di-
rectly or as Plaintiffs) (a) at the present time; (b)
at the time of the commencement of the action; (c) at
the time of the accident; (d) for three years immedi-
ately preceding the accident.

Interrogatory No. 2

State in detail each and every injury claimed to have
been sustained by the Plaintiffs as a result of the acci-
dent alleged in the Complaint.

Interrogatory No. 3

As to each and every injury referred to in answer to question 2, state (a) the duration of the symptoms resulting therefrom; (b) the nature and extent of any disability resulting therefrom; (c) whether or not any disability is permanent in nature, and if so, in what respect such injury is claimed to be permanently disabling and to what extent.

Interrogatory No. 4

Were Plaintiffs confined to a hospital as a result of the alleged injuries, and if so, give the name and address of the hospital and the duration of the confinement.

Interrogatory No. 5

Were Plaintiffs confined to bed at home as a result of the alleged injuries, and if so, give the beginning and ending dates of such confinement.

Interrogatory No. 6

Were Plaintiffs confined to their home for any period as a result of the alleged injuries, and if so, give the dates of commencement and termination of such confinement.

Interrogatory No. 7

Did Plaintiffs visit any doctors as a result of the alleged injuries, and if so, give the name and address of each doctor visited, the dates of each visit to each doctor, the nature of the treatment given by each doctor on each visit, the diagnosis and prognosis of each doctor, and the charges of each doctor, showing in detail how the total was computed.

Interrogatory No. 8

If Plaintiffs were confined to a hospital, state the amount of the hospital charges.

Interrogatory No. 9

List each and every item of special damage which Plaintiffs claim resulted from their injuries herein, and as to any special damages consisting of payments to persons such as nurses, housekeepers, etc. for services, give the name and address of each such person and the dates of services.

Interrogatory No. 10

Were Plaintiffs employed at the time of the accident?

Interrogatory No. 11

If the answer to the preceding question is yes, state the name and address of Plaintiffs' employers, the length of time employed, the nature of Plaintiffs' duties, and salary and other income received by Plaintiffs per week, and if such salary includes overtime, and amount of such salary attributable to such overtime.

Interrogatory No. 12

If Plaintiffs were employed at the time of the accident, give the name and address of each employer of the Plaintiffs for the five years immediately preceding the accident, the nature of the work done during that period, and the salary received.

Interrogatory No. 13

If Plaintiffs were employed at the time of the accident did they file federal income tax returns for each of the five years immediately preceding the accident, and

if so, state with which District Director's office said returns were filed.

Interrogatory No. 14

If Plaintiffs were employed at the time of the accident, were they required to absent themselves from their employment for any period of time as a result of the accident, and if so, state the length of time they remained away from their employment, and whether or not they received any compensation from their employers during that period.

Interrogatory No. 15

(a) Name the airports at which you either took off or landed, or both, on October 18, 1956, prior to your arrival in the vicinity of Phoenix, Arizona.

(b) State all such take-off and landing times and the time of your first transmission to the airport traffic control tower at the Phoenix Sky Harbor Municipal Airport (hereinafter referred to as the Phoenix Airport).

Interrogatory No. 16

(a) Has any civil or criminal action been instituted against you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties instituting such action or actions, the court or courts involved, and the results.

Interrogatory No. 17

(a) Other than the instant case, has any civil action been instituted by you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties against which such action or actions were instituted, the court or courts involved, and the results.

Dated: September 10, 1959.

JACK D. H. HAYS,

United States Attorney

/s/ WILLIAM E. EUBANK,

Assistant United States Attorney

Two copies of the above and foregoing Request for Answers to Interrogatories received this 10 day of September, 1959.

HASH & HASH

/s/ By EDGAR HASH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 10, 1959.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES

Come Now the Plaintiffs above named and, for answer to the Defendant's Interrogatories heretofore served upon them, state as follows:

Interrogatory No. 1

The answer to Interrogatory No. 1 is as follows: The residence address of the Plaintiffs, Glenn A. Price and

his wife is, and since before October, 1953, has been Vashon Island, King County, Washington.

Interrogatory No. 2

In answer to Interrogatory No. 2 Plaintiff has attached to these answers to Defendant's Interrogatories copies of letters from Doctor Stovall of the Orthopedic Clinic, Phoenix, Arizona and Doctor Robert L. Maresca of Phoenix, Arizona, detailing injuries received in the accident and treated at Phoenix, and the medical treatment thereof. In addition to the injuries therein alleged, Plaintiff states that in the accident two pairs of spectacles owned by him were broken, and a lower plate of dentures were broken. Plaintiff was also treated on his return to his home on Burton, Vashon Island, Washington, by Doctor McIntyre and Doctor Ramaker of Seattle, Washington. Plaintiff further states that his attorney has informed him that depositions of both of these physicians have been completed, at which deposition an attorney for the Government, Mr. Obenour, was present, in which further treatment of Plaintiff's injuries as above stated was discussed in detail. In brief summary the Plaintiff states that the fracture of his mandible was treated by the making of new dentures by Dr. Ramaker, but as a result thereof there was a closure of Plaintiff's lower jaw resulting in the present necessity for one and possibly two additional sets of dentures at a cost of from \$250.00 to \$350.00; that said closure, which was the proximate

result of the broken mandible caused by the accident, has resulted in the impairment of his hearing; that although the making and fitting of new dentures will arrest the impairment of said hearing, such impairment as has occurred will be permanent. The letters from Dr. Stovall and Dr. Maresca attached hereto, and the testimony of Drs. McIntrye and Ramaker from their depositions are included herein and made a part hereof to the same extent as though set forth at length herein.

Interrogatory No. 3

Reference is hereby made to the documents and depositions referred to in Plaintiff's answer to Interrogatory No. 2, which are a made a part hereof to the same extent as though set forth at length herein. More particularly:

(a) In addition to the times indicated in the attachments hereto and the depositions hereinabove referred to, Plaintiff states that the fractures of the third, fourth and the fifth right ribs anteriorly, referred to in the letter of Dr. Stovall attached hereto, rendered Plaintiff unable to engage in any extensive physical activity because of the soreness of said ribs.

(b) Plaintiff states that, as set forth in the deposition of Dr. Ramaker, his hearing has been impaired as a result of said accident.

(c) That said impairment of hearing, referred to hereinabove in subparagraph (b), is permanent in nature.

Interrogatory No. 4

Plaintiff states that he was confined to the Memorial Hospital in Phoenix from October 18, 1956, until October 22nd, 1956.

Interrogatory No. 5

Plaintiff, Glenn A. Price, was not confined to bed at home as a result of the above alleged injuries.

Interrogatory No. 6

Plaintiff, Glenn A. Price, states that while he was not confined to his home as a result of said accident, as stated hereinabove, his physical activities were severely impaired because of soreness of his rib cage due to the fractures of the third, fourth and fifth right ribs anteriorly, above referred to, for approximately one month from the occurrence of the accident, or until November 18, 1956.

Interrogatory No. 7

Reference is made to the letters attached hereto for details of services of doctors Stovall and Maresca, in Phoenix, Arizona, and to the depositions referred to hereinabove for the number of visits and treatment by Drs. McIntyre and Ramaker, in Seattle, Washington. In addition, Plaintiff, Glenn A. Price, obtained replacements for the two pair of spectacles which were broken in the accident from Dr. Darboe in Tacoma, Washington. For diagnosis and prognosis of each doctor, with the exception of Dr. Darboe, reference is made to the letters attached hereto from Drs. Stovall and Mar-

esca and to the depositions of Drs. McIntyre and Ramaker. The charges of said physicians are summarized as follows:

Dr. Stovall, (Orthopedic Clinic Phoenix, Arizona)	\$ 45.00
Dr. Maresca	100.00
Dr. McIntyre, Seattle, Wash.	35.00
Dr. Darboe, Tacoma, Wash. (New spectacles)	108.38
Dr. Ramaker, Seattle, Wash. (New dentures)	242.00
Total	<u>\$530.38</u>
Dr. Ramaker—Estimated charges of necessary new denture to be incurred in the future	250.00—350.00
Grand total	<u><u>\$780.38—880.38</u></u>

Interrogatory No. 8

The amount of the hospital charges paid by Glenn A. Price for his confinement at Memorial Hospital in Phoenix were \$221.40.

Interrogatory No. 9

In addition to the above, special damages claimed by Plaintiff, Glenn A. Price, are as follows:

Ambulance Service in Phoenix, Arizona	15.00
Paid to Phoenix Aviation, Phoenix, Arizona, for care and storage of the aircraft	140.00
Value of Plaintiff's aircraft, a Piper Tri-Pacer, which was a complete loss	9,000.00
Total	<u><u>\$9,155.00</u></u>

Interrogatories Nos. 10 through 14

Plaintiff, Glenn A. Price, was self-employed at the date of the accident, and makes no claim herein for loss of wages or profits.

Interrogatory No. 15

Plaintiff's itinerary on the day of the accident, to-wit, October 18, 1956, was as follows:

Left San Angelo, Texas, at 10:07 a.m.; arrived Wink, Texas, at 11:37 a.m.;

Left Wink, Texas, at 12:40 p.m.; arrived El Paso, Texas, at 2:10 p.m.;

Left El Paso, Texas, at 3:07 p.m.

Interrogatory No. 16

A civil action was instituted against Plaintiff in early 1957 by Tovrea Land & Cattle Co., for damages to cattle pens and cattle caused by the accident. Title of the case: "Tovrea Land & Cattle Co., Plaintiff vs. Glenn Price, Defendant," Cause No. 91799 of the Superior Court of the State of Arizona, in and for the County of Maricopa. Plaintiff herein, Glenn Price, defendant therein, filed an answer and counterclaim to the complaint in said action; the action was compromised and settled and dismissed in April, 1958. This was the only civil or criminal action instituted against Plaintiff, Glenn A. Price as a result of said accident.

Interrogatory No. 17

Other than the answer and cross-complaint referred to in the answer to Interrogatory No. 16 hereinabove,

no civil action has been instituted by me in connection with this accident.

/s/ GLENN A. PRICE

Subscribed and sworn to before me this 24th day of September 1959.

[Seal]

/s/ C. H. NORSTROM,

Notary Public in and for the
State of Washington, residing at
Vashon.

The Orthopedic Clinic
2620 North Third Street
Phoenix, Arizona.

May 29, 1957

Virginia Hash, Attorney at Law
Mayer-Heard Building
Phoenix, Arizona.
Re: Glen A. Price

Dear Miss Hash:

Mr. Glen A. Price of Burton, Washington, has requested that write you concerning injuries he sustained on October 18, 1956, when he was in an airplane crash.

The patient was originally examined by me in the emergency room at Memorial Hospital at approximately 7:30 p.m., October 18, 1956. History obtained from the patient was that at about 6:30 p.m., October 18, 1956, he was in the process of making an approach landing to the Sky Harbor Airport when he mistook the

lights of the Tovrea Stockyards for the runway and before realizing his mistake, he was unable to raise the plane and the airplane crashed into the Stockyards.

In the accident the patient sustained the following injuries:

1. Laceration of the left upper eyelid near the medical side.
2. Laceration of the left mandibular area.
3. Contusion of right mid clavicular area.
4. Fractures of the 3rd, 4th and 5th right ribs anteriorly.
5. Small abrasion, 1/4 inch in diameter over the left leg below the knee.
6. Multiple abrasions and contusions of the hands and left forearm.
7. Fracture of the mandibular rami.

At the time of my examination, the patient's condition was considered to be good. Dr. Robert Maresca was called concerning the fractured mandible as well as the lacerations about the head. For Dr. Maresca's findings, suggest that you contact his office.

The patient was admitted to Memorial Hospital where he remained until October 22, 1956. While in the hospital, his fractured ribs were treated by means of a chest binder and he made progressive improvement and at the time of discharge he was advised to seek further medical attention on his return to his home in Burton, Washington.

Since being discharged from the hospital, the patient has not been re-examined by me and I am in no posi-

tion to state if there was any permanent disability present; however, none was expected.

I trust that this is the desired information and if I can be of further service, call upon me.

Yours very truly,

/s/ SIDNEY L. STOVALL, M.D.

SLS:mb

Robert L. Maresca, M.D.
2021 North Central Avenue
Phoenix, Arizona.

June 3, 1957

Miss Virginia Hash, Attorney at Law
Mayer-Heard Building
Phoenix, Arizona.

Dear Miss Hash:

I have been requested to furnish you with a statement at the time I was attending Mr. Glenn A. Price at Memorial Hospital.

I was requested to see Mr. Price by Dr. Sidney Stovall the evening of October 18, 1956 within about 90 minutes after his accidental landing in the stockyards. He was in a state of mild shock, (Blood pressure 100-70, pulse 120). When examined by me, he was found to have the following injuries:

- 1- a fracture of the left condyle of the mandible.
- 2- a through and through laceration of the left cheek about 2 inches long.

3- a hockey stick shaped through and through laceration of the left mentum about $2\frac{1}{2}$ inches long,

4- a laceration of the left eyebrow and eyelid down to, but not through the lid margin,

5- a laceration inside the mouth extending from the lower right lateral incisor area around the anterior surface of the mandible to the area of the second lower left molar tooth. This tissue was found to be almost completely avulsed from the mandible surface.

There had been a minimal blood loss.

I repaired these lacerations. The care of the contused rib cage was done by Dr. Sidney Stovall. There was a small laceration on the dorsum of the left middle finger.

My charge for this work was \$100.00.

Yours very truly,

/s/ R. L. MARESCA, M.D.

RLM-sf

Duly Verified.

[Endorsed]: Filed Oct. 2, 1959.

In the United States District Court
For the District of Arizona

No. Civ. 2962-PHX.

WILLIAM CARL CUNNINGHAM and VERA MAE
CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REQUEST FOR ANSWERS TO
INTERROGATORIES

To the above-named Plaintiffs, William Carl Cunningham and Vera Mae Cunningham, husband and wife.
c/o Messrs. Hash & Hash, Attorneys at Law, 412
Arizona Savings Building, Phoenix, Arizona.

You Are Hereby Notified to answer under oath the interrogatories numbered from 1 to 17, inclusive, as set out hereafter, within fifteen (15) days of the time service is made upon you in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Interrogatory No. 1:

State the residence address of plaintiffs William Carl Cunningham and Vera Mae Cunningham (hereinafter addressed directly or as Plaintiffs) (a) at the present time; (b) at the time of the commencement of the action; (c) at the time of the accident; (d) for three years immediately preceding the accident.

Interrogatory No. 2:

State in detail each and every injury claimed to have been sustained by the Plaintiffs as a result of the accident alleged in the Complaint.

Interrogatory No. 3:

As to each and every injury referred to in answer to question 2, state (a) the duration of the symptoms resulting therefrom; (b) the nature and extent of any disability resulting therefrom; (c) whether or not any disability is permanent in nature, and if so, in what respect such injury is claimed to be permanently disabling and to what extent.

Interrogatory No. 4:

Were Plaintiffs confined to a hospital as a result of the alleged injuries, and if so, give the name and address of the hospital and the duration of the confinement.

Interrogatory No. 5:

Were Plaintiffs confined to bed at home as a result of the alleged injuries, and if so, give the beginning and ending dates of such confinement.

Interrogatory No. 6:

Were Plaintiffs confined to their home for any period as a result of the alleged injuries, and if so, give the dates of commencement and termination of such confinement.

Interrogatory No. 7:

Did Plaintiffs visit any doctors as a result of the alleged injuries, and if so, give the name and address of each doctor visited, the dates of each visit to each

doctor, the nature of the treatment given by each doctor on each visit, the diagnosis and prognosis of each doctor, and the charges of each doctor, showing in detail how the total was computed.

Interrogatory No. 8:

If Plaintiffs were confined to a hospital, state the amount of the hospital charges.

Interrogatory No. 9:

List each and every item of special damage which Plaintiffs claim resulted from their injuries herein, and as to any special damages consisting of payments to persons such as nurses, housekeepers, etc. for services, give the name and address of each such person and the dates of services.

Interrogatory No. 10:

Where Plaintiffs employed at the time of the accident?

Interrogatory No. 11:

If the answer to the preceding question is yes, state the name and address of Plaintiffs' employers, the length of time employed, the nature of Plaintiffs' duties, and salary and other income received by Plaintiffs per week, and if such salary includes overtime, and amount of such salary attributable to such overtime.

Interrogatory No. 12:

If Plaintiffs were employed at the time of the accident, give the name and address of each employer of the Plaintiffs for the five years immediately preceding the accident, the nature of the work done during that period, and the salary received.

Interrogatory No. 13:

If Plaintiffs were employed at the time of the accident, did they file federal income tax returns for each of the five years immediately preceding the accident, and if so, state with which District Director's office said returns were filed.

Interrogatory No. 14:

If Plaintiffs were employed at the time of the accident, were they required to absent themselves from their employment for any period of times as a result of the accident, and if so, state the length of time they remained away from their employment, and whether or not they received any compensation from their employers during that period.

Interrogatory No. 15:

(a) Name the airports at which you either took off or landed, or both, on October 18, 1956, prior to your arrival in the vicinity of Phoenix, Arizona.

(b) State all such take-off and landing times and the time of your first transmission to the airport traffic control tower at the Phoenix Sky Harbor Municipal Airport (hereinafter referred to as the Phoenix Airport).

Interrogatory No. 16:

(a) Has any civil or criminal action been instituted against you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties instituting such action or actions, the court or courts involved, and the results.

Interrogatory No. 17:

(a) Other than the instant case, has any civil action been instituted by you as a result of your aircraft accident on October 18, 1956?

(b) If your answer is in the affirmative, specify the party or parties against which such action or actions were instituted, the court or courts involved, and the results.

Dated: September 10, 1959.

JACK D. H. HAYS,
United States Attorney.
/s/ WILLIAM E. EUBANK,
Assistant United States Attorney.

Two copies of the above and foregoing Request for Answers to Interrogatories received this 10 day of September, 1959.

HASH & HASH.
/s/ By EDGAR HASH,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 10, 1959.

In the District Court of The United States
For the District of Arizona

Civ.-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE,
Plaintiffs,

vs.

UNITED STATES of AMERICA,
Defendant.

DEPOSITION OF
BERNARD JOHN OSWALD

Deposition of Bernard John Oswald, a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Glenn A. Price and Jane Doe Price are the plaintiffs and United States of America is the defendant, pending in the District Court of the United States for the District of Arizona pursuant to subpoena before Gerald J. Popelka, Notary Public in and for the State of Washington residing at Tacoma, commencing at 10:00 o'clock a.m., Wednesday, September 30, 1959, at the United States Courthouse, Tacoma, Washington.

Appearances: On behalf of the Plaintiffs: Mr. Robert M. Reynolds, Attorney at law, Tacoma Building, Tacoma, Washington.

On behalf of the Defendant: Mr. John S. Obenour, Assistant U.S. Attorney, Federal Building, Tacoma, Washington. [1] *

*Page number appearing at top of Original Deposition.

It was stipulated by counsel that all objections other than as to the form of the question or responsiveness of the answer be reserved until the time of trial.

It was further stipulated by the witness and counsel that the signature of the witness to the deposition be waived.

The following proceedings were then had, to wit:

Mr. Reynolds: I think the record should show that insofar as is necessary to do so, representing the plaintiffs we will waive notice of time and place of the taking of depositions even though we think that the U.S. Attorney in Phoenix was a little bit tardy in getting the thing started.

I think the record should also show that while I occasionally represent Mr. Oswald, my firm, on this particular occasion I am appearing as attorney for the plaintiffs, Glenn A. Price and William C. Cunningham, and not as attorney for Mr. Oswald. [2]

BERNARD JOHN OSWALD,

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Obenour:

Q. Will you state your full name?

A. Bernard John Oswald.

Q. And where do you live, Mr. Oswald?

A. 809 Princeton Street.

Q. Your occupation?

A. You can call it a flight—airport and flight operator.

(Deposition of Bernard John Oswald.)

Q. Airport operator?

A. And flying service operator.

Q. And are you also and instructor? A. Yes.

Q. How long have you operated an airport?

A. I operated an airport at Cle Elum, Washington, from possibly January of 1942 to June of '43. Then we started our operation on the present Tacoma Airport in the first part of 1946.

Q. And it would be January or February of 1946 you have continued to operate the Tacoma Airport?

A. The Tacoma Airport, yes. It was actually the—right at the end of the war we began to operate commercially about the first of the year. There was—the airport [3] was under construction the latter part of '45.

Q. What is the name of the airport?

A. Tacoma Airport, Incorporated.

Q. And is it also known by your name?

A. The Oswald Flying Service operates the flying service, and I also serve as airport manager. We have the airport leased.

Q. And you have the airport leased? How do you mean?

A. The airport is a separate corporation, Tacoma Airport, Incorporated, and I operate the Oswald Flying Service as an individual, and I have a lease for the use of the airport with Tacoma Airport, Incorporated.

Q. Do you have an interest in the Tacoma Airport, Incorporated?

A. Yes. I am the president of the corporation.

(Deposition of Bernard John Oswald.)

Q. Now, you operate the airport, or are you manager of the airport itself?

A. Yes. I am listed with the Federal Aviation Agency as airport manager.

Q. And how long have you served as airport manager?

A. Since it was originally built. Since the first part of 1946.

Q. And what was your position in Cle Elum at the airport?

A. We had the airport at Cle Elum listed from the City of Cle Elum, a municipal airport, and I served as manager [4] and flight operator there.

Q. What do you mean by flying service?

A. Well, the flying service is the actual facility that furnishes services to the flying public, gas, oil, and servicing and maintenance and repairs and flight instruction and charter flights and things like that.

Q. Do you have airplanes for charter there?

A. Yes.

Q. Do you manage this charter service of the airplanes?

A. That is part of our operation, a small part of our operation. I manage the over-all operation of all the facilities we have to offer.

Q. Do you manage all of the operation of the Oswald Flying Service?

A. That is right.

Q. How long have you done that?

A. Well, actually, the Oswald Flying Service was originally started way back in 1937, but there have been interruptions. There was interruptions during the war.

(Deposition of Bernard John Oswald.)

But I have been at the present location since—actually you might say we began our operation approximately October of 1945 and brought the first airplane in there.

Q. When did you begin flying yourself?

A. 1933. [5]

Q. What was your flight experience from 1933 to date?

A. I have approximately ten thousand hours of flying time.

Q. What was your occupation from 1933 until you began the Oswald Flying Service in '37?

A. I was a truck driver up at Beacon's Moving and Storage Company.

Q. What was the nature of your training?

A. Well—

Q. How did you obtain your flight training?

A. I was enrolled as a student at the—originally at the old Tacoma Field before it became McChord Air Force Base, and then I transferred, actually, over to the Mueller-Harkins Airport, which is out right across the street from the Mountain View Cemetery, and I finished my training and made my solo flight there. I believe they called that Washington Air College at that time.

Q. You obtained your flight training on your own, then, rather than being in some service, military service?

A. That is right. All my flight training was under civilian direction.

Q. And from 1933 to 1937 was flying your profession, or was it more for your personal pleasure?

A. That is right. It was more for my personal pleasure and learning training at the same time. [6]

(Deposition of Bernard John Oswald.)

Q. Now, in 1937 you began your Oswald Flying Service? A. That is right.

Q. And from 1937 on was flying your profession?

A. Well, it was partially so. I had this old airplane and used it in barnstorming, hauling—carrying passengers and so forth. Actually, I began to—in the meantime I obtained what they called at that time a transport pilot's license, and I began doing some instructing—actual student training in '39. I worked for the operator—did some work for the operator there.

Q. Now, you began instructing in 1939. That was on a civilian basis? A. That's right.

Q. How long have you served as an instructor?

A. Since approximately 1939.

Q. What has been your experience as an instructor?

A. Well, I have been working at flight training practically all that time except during the period when I was flying for Boeing Aircraft, and I would estimate I have possibly five to six thousand hours of actual instruction time given to aviation students.

Q. Has that all been on a civilian basis?

A. Actually none of it was purely military. During the war we had this contract with the CAA for war [7] training service, a flight training program. They were actually military students flying in the Reserve status.

Q. Was that C.P.T.?

A. Well, it was C.P.T. just before the war, and I was engaged in that for a short time as an instructor working for the operator at the Mueller-Harkins Airport. But then I had my own contract when they called

(Deposition of Bernard John Oswald.)

it the War Training Service. After the war started, they changed it over to War Training Service.

Q. Where was that?

A. That was at Cle Elum.

Q. What service were you instructing?

A. It was for the Air Force.

Q. It was for the Army Air Force?

A. For the Air Force. Some were glider pilots. They were getting training as glider pilots, and some of them went in for instructors. It was a varied program.

Q. Was that a pre-primary training or was that a program that included varying degrees of experience?

A. We just had the primary phase, the first forty to fifty hours, and they went to other schools from our place.

Q. How long did you serve in this capacity as instructor?

A. It was just one winter, I believe. We started that program approximately in September of '42 and it was [8] terminated in May of '43. We just went through the one winter, as I remember, on that, and they began to cancel those contracts out.

Q. And after that did you continue to serve as flight instructor?

A. No. Then I went to work flying at Boeings in July—I believe it was July of '43.

Q. What capacity?

A. As a production test pilot.

Q. And you were flying what then?

A. B-17's and B-29's.

Q. How long did you continue in that capacity?

(Deposition of Bernard John Oswald.)

A. Until the end of the war. I believe it was approximately August of 1945 when we were laid off over there.

Q. And thereafter you began this operation in Tacoma? A. That is right.

Q. And from the end of 1945, approximately, to date you have then continued, as I understand it, to have an interest in the ownership of the Tacoma flying field to manage the airport itself under the Oswald Flying Service, and also to give flight instructions, is that right, sir?

A. That is correct, with the exception that my interest in the airport—financial interest in the airport was fairly minor at the beginning. I helped in the [9] organization and construction of the airport, but over the period of years I have become more financially interested in the airport itself.

Q. And you have actually, though, been in control of and operating the actual flight facilities at the airport since 1945 to date, is that right?

A. That is right.

Q. What is the nature of the flight instructions you have given since 1945?

A. It has all been civilian instruction up to those primer flying—up to and including multi-engine ratings and instrument ratings. Principally in light aircraft.

Q. Who controls flying in the United States?

Mr. Reynolds: That is objected to as calling for a legal conclusion.

Go ahead, Mr. Oswald, you may answer.

(Deposition of Bernard John Oswald.)

A. The Civil Aeronautics Administration, actually, and now the Federal Aviation Agency.

By Mr. Obenour:

Q. Would you describe the control by the CAA, as it was known then, and the FAA as it is now known as, over the qualifications of pilots? Shall I break that down?

A. Yes. It is pretty complicated. [10]

Q. Well, what is required under Federal regulations in order to operate an aircraft?

A. Before a student can make his solo flight—

Q. (Interposing) First of all—excuse me—is there a system of licensing controlled by the CAA, now the FAA?

A. Yes.

Q. And what are the different licenses that the CCA and FAA issue?

A. They start out with a student pilot certificate. They don't call them licenses, they call them certificates now, and a—they call them a student pilot certificate, private pilot certificate, commercial pilot certificate, and then there is a number of ratings denoting their skill that accompany these certificates.

Q. What are these various ratings?

A. They call them single-engine land ratings, single engine and multi-engine land ratings, and a single-engine sea and a multi-engine sea rating.

Q. "Sea" being water?

Mr. Reynolds: Sea (spelling).

A. Yes. Flight instructor ratings and instrument ratings, and airline transport ratings. [11]

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Are there ratings for night flight?

A. No. The only requirement for day and night flying is that the pilot must have—how is that rating—he must have had five take-offs and landings within the last ninety days at a period one hour after sunset before he can carry any passengers on a night flight.

Q. What are the limitations upon the operations under these different certificates?

A. The single-engine land—do you mean under the different ratings?

Q. Under the different certificates.

A. Well, under the different certificates a private pilot's certificate allows the holder to engage purely in private flying any place that he wants—any place that he wants to go and is permitted to go. But he cannot engage commercially in the sense that he would accept any money for his services as a pilot.

Q. He is qualified, however, to take passengers with him, is he not?

A. That is right.

Mr. Reynolds: This is a private—

Mr. Obenour: Yes, a private certificate.

By Mr. Obenour:

Q. What are the limitations on a student certificate? [12]

A. A student certificate may not carry any passengers other than his flight instructor, and he is not permitted to leave the area of his home operating base on any of his solo flights until he is qualified and checked out by his flight instructor.

(Deposition of Bernard John Oswald.)

Q. And the commercial rating, that is as the name implies? A. Yes.

Q. He can engage in flying for commercial purposes?

A. That is right. He can earn his living at flying?

Q. Now, who evaluates the qualifications of a pilot in order to grant or deny these certificates?

A. Actually the CAA, or the FAA, inspectors are the prime examiners. The thing is in their charge, but they do have other designated flight examiners who are not employees of the FAA who can give flight tests by permission from an FAA inspector.

Q. Do you serve in that capacity?

A. Not at the present time.

Q. Have you?

A. Yes. I was a private pilot examiner quite a number of years ago.

Q. How are the flight instructors controlled by the FAA or the CAA?

A. The flight instructors have to—they have to take a very rigid written and flight examination given directly [13] by the FAA inspector himself.

Q. Do you have such a certificate?

A. Yes.

Q. How long have you had such a certificate?

A. I believe since 1939.

Q. In your flight training what part does the flight instructor play in evaluation of the qualifications of a student pilot towards obtaining a private certificate?

(Deposition of Bernard John Oswald.)

A. Well, all of the students training is under the direct supervision of his instructor. Also, the larger flight schools usually have a chief pilot who is also a flight instructor. The instructor who is giving the lessons to a particular student, unless this particular student has problems of any kind, he can refer them to the chief pilot. But normally the—practically the whole course of flight training up to and including the actual flight tests is left under the supervision of his instructor.

Q. What do you mean by flight tests?

A. That is a culmination of his training after he has had at least a minimum number of prescribed hours of flight training. Then he is eligible to take his actual flight tests either from the FAA or from his designated FAA flight examiner to prove that he is competent to carry passengers and be a safe pilot. [14]

Q. How many instructors do you have in your service?

A. Oh, at the present time we have two fulltime instructors besides myself, and we have another part-time instructor.

Q. And do you have a chief instructor or chief pilot?

A. At the present time I am serving as the chief pilot. That has only been for approximately the last three months. Before that Bob Crowthers was our chief pilot. But he has left our employ.

Q. What are the courses of instruction that you provide at the Oswald Flying Service?

(Deposition of Bernard John Oswald.)

A. We provide private and commercial flying courses and single and multi-engine land with flight instructor instrument ratings.

Q. And the only service that you do not provide, then, are transport certificates?

A. As far as I know there is no actual course towards the airline transport rating. It is something that a man has—usually has a lot of experience gathered through the years before he makes—he has to make his application directly to the FAA for that rating.

Q. Then everything, though, that goes to make up this flight experience of the instrument ratings, flight instructor ratings, and so forth, are all provided by your service?

A. They are available. In order to get to even be eligible [15] for the airline transport rating, I believe they have to have fifteen hundred solo hours. So they would have to be actually employed at aviation for quite a while as a co-pilot or other types of flying before they would even be eligible to apply for that. So it is more a matter of experience and not so much as training. It couldn't really be given on any flight course.

Q. And if I understand it, then, your total time is ten thousand hours?

A. I am estimating that. I haven't kept any accurate records of my flying time since the end of the war. I had approximately six thousand hours at the end of the war, and just estimating that, I have approximately that number of hours now.

Q. About five thousand of that has been instructor time?

(Deposition of Bernard John Oswald.)

A. Roughly. I would say between five and six thousand.

Q. And in the course of this five or six thousand hours instructor time are you regularly called upon to evaluate the students for whom you are providing instructions as to the qualifications of the students?

A. Not regularly because most of our operation out there—we have another instructor designated as chief pilot who handles that duty.

Q. However, in instructing are you called upon regularly [16] to evaluate your students in the various stages of instruction in passing them on to more advanced stages?

A. I haven't performed that duty for a good number of years. That, again, was the function of the chief pilot, and there were no—it really wasn't a duty of his. The chief pilot is required just to make check flights a certain times to analyze the progress of the student.

Q. Do you grade your students in your flight instructions? A. Yes.

Q. And in grading them is that not evaluating the progress of the students as he goes through the stages?

A. It wouldn't show his progress along in his training. It would show the—his degree of proficiency and grades on each flight lesson.

Q. An evaluation of the individual as to his proficiency in the various stages of instruction? Would that be what you are doing, instructing?

A. Well, the FAA, or CAA, tells us to grade the man according to his proficiency for the number of

(Deposition of Bernard John Oswald.)

flight hours that he has. In other words, if a man has twenty hours of flying time, he wouldn't be as good as a man with five hundred. But if his proficiency is okay at the twenty-hour period, we grade him an average grade.

Q. That calls upon you as an instructor to evaluate the [17] proficiency of your students, does it not?

A. That is right.

Q. And you do that regularly in the course of your entire instruction? A. That is right.

Q. So that in the course of your five or six thousand hours instructing, you have and regularly do evaluate the proficiency of your respective students?

A. That is right. Of course, in the olden days they didn't have records. These records that we are keeping now are more or less recent, and due to—you know, newer regulations.

Q. In olden days the records may not have been so complete, but you still did the same function in determining to your satisfaction that a student was competent within the various stages of instruction before you progressed the student, is that not correct, sir?

A. There weren't any written records kept in those days other than the—just the actual notation in the student's log book, and the grades weren't shown. Just the maneuvers performed were shown in the log book.

Q. But the instructor would be the person who would determine when he was qualified to solo or when he was qualified to progress?

A. All the responsibility is on the instructor. [18]

Q. And that means that as such you as an instructor

(Deposition of Bernard John Oswald.)

—or any instructor is called upon to evaluate the individual student in his proficiency in flight, is that right, sir?

A. Well, I wouldn't say that he is called upon to—he would make a mental evaluation as to whether the student was qualified to go out on that particular flight. But there is no written record as such.

Q. Whether there is a record written or not, the instructor necessarily has to evaluate the individual student's proficiency in all stages, does he not?

A. That is right.

Q. Now, do you know Glenn Price?

A. Yes.

Q. And how did you become acquainted with him?

A. He and his wife came to our airport and made an inquiry about taking flight instructions for himself, and we went through the usual channels of explaining what he could do, and so on, and he ended up becoming a student of our school.

Q. Did you talk to him first?

A. Yes. I happened to make the first contact with him when he came into our office.

Q. And did he take flight instruction from you then?

A. Yes. I personally gave him his flight instructions. [19]

Q. Do you have the records with—any records you maintained of his flight instruction?

A. Yes, I do. Do you want those now?

Q. Yes, please.

(Whereupon a document was handed to Mr. Obenour by the witness.)

(Deposition of Bernard John Oswald.)

Mr. Obenour: I will mark these three papers with an "A" in the upper lefthand corner of the top sheet.

By Mr. Obenour:

Q. Would you please describe what these are, Mr. Oswald?

A. The first one is a carbon copy of the school graduation certificate indicating that he had taken and passed the course as a private pilot and was eligible for the flight test—for the FAA flight test.

Q. Is that a record of your flying service?

A. It is a Civil Aeronautics form that we fill out when the student completes his course. The original goes to the —at this time it was filed with the CAA—goes to the CAA with his application for his flight test.

Q. And this would be a carbon copy, then, of the original submitted for Mr. Price to the CAA on completion of his instruction?

A. The CAA has the original of this. [20]

Q. What are the other two documents?

A. They are flight sheets which are the lessons—on which the lessons are recorded and are a duplicate of flying lessons that are put in his log book—in his pilot's log book.

Q. Who makes that up?

A. The flight instructor.

Q. Who was the flight instructor in this case?

A. It was myself in this case.

Q. Are your initials on these sheets?

A. Yes.

Q. What are the columns where your initials are?

(Deposition of Bernard John Oswald.)

A. They are—the initials are under the instructor's column.

Q. Do these two sheets show the total individual—rather—show each individual lesson given by you to Mr. Price? A. Yes.

Mr. Obenour: We offer Exhibit A.

Mr. Reynolds: May I see the exhibit, please?

Mr. Obenour: Certainly.

(Whereupon, a document was handed to Mr. Reynolds by the witness.)

Mr. Reynolds: Mr. Oswald, I note that on Exhibit A some of the initials under the [21] "instructor's initials" column, which is the fourth column from the left, are not "BJO." I assume "BJO" are your initials?

The Witness: That is right.

Mr. Reynolds: Well, who is "CLB"?

The Witness: Charles L. Bunch. He was a flight instructor working with us at that time.

Mr. Reynolds: And "CB", would that be the same man?

The Witness: Yes, sir.

Mr. Reynolds: And there is one here that looks like "CN" or just "N".

The Witness: I believe that was Charles Gross.

Mr. Reynolds: And he was another instructor?

The Witness: Yes. He was working for us at the time, and he was our—at that time he was our chief pilot.

Mr. Reynolds: And who is "CW" or "stroke" "W"?

The Witness: I haven't looked at those. I don't—

(Deposition of Bernard John Oswald.)

off hand I can't remember who that would be at that time. It would be another instructor.

Mr. Reynolds: You haven't offered that yet, have you?

Mr. Obenour: Yes, I have. I just offered it. [22]

Mr. Reynolds: Well, I will make an objection for the record on the grounds of relevancy.

By Mr. Obenour:

Q. The entry to which counsel has been referring is an entry on the second sheet, "CLB" under the date of May 29, is that right, sir?

A. Yes.

Q. That would be Mr. Bunch? A. Yes.

Mr. Reynolds: And also an entry on the first sheet.

Mr. Obenour: This is the first sheet.

Mr. Reynolds: The second page of the exhibit.

By Mr. Obenour:

Q. And then the third sheet.

A. These are schedules I probably wasn't able to meet and another instructor took him out.

Q. The fourth line from the top, "CB".

A. The same person, yes.

Q. That would be the date of June 10, '55.

A. Yes.

Q. And June 15 and June 16, "CB", June 28, "CB"

A. Yes.

Q. And July 14. A. Yes. [23]

Q. And July 25.

A. Yes. That would be Charles Gross. I recognize his handwriting.

Q. And July 28, two entries.

(Deposition of Bernard John Oswald.)

A. I can't remember who made those two. I would have to—we had at times part time instructors that were helping us out.

Q. How about August 1 and August 10?

A. That is Charles Gross again. This is where he actually—he was the designated CAA flight examiner who gave him the flight test.

Q. So the entries for 8-1 and 8-10 would be the CAA flight test?

A. Yes, private pilot test okay.

Q. All right. Those are the entries that were not your entries?

A. That is right.

Q. Now, this flight training began for Mr. Price on what date, sir?

A. February 22, '55.

Q. And this schedule shows the first column, the date, in the second column the airplane number, the third column is the flight time of the individual instructor or flight, is that right?

A. That is right.

[24]

Q. And the third is called "dual", and the fourth is "solo." Would you explain that?

A. "Dual" is when the flight instructor is in the airplane accompanying the student, and "solo" is when he is flying alone.

Q. Now, the next one is the—column five is "instructor's initials," and thereafter there are some twenty columns which I believe would describe the various stages of the flight training, is that right, sir?

A. Not stages, but various maneuvers.

Q. Maneuvers?

A. That we gave him.

Q. All right, sir. And finally the column at the end appears the signatures of Mr. Price.

(Deposition of Bernard John Oswald.)

Does the student have to sign each entry after the instruction?

A. It isn't required, but we have been having them do it. We have been making a practice of it.

Q. What is the purpose for the practice of having them sign it?

A. Oh, it makes the records of our school look more complete and efficient.

Q. What are these entries that are made in these twenty columns, the figures "3's," "2's", "4's", and so forth?

A. That is the grading system. [25]

Q. How are the grades given?

A. "3" is considered the average grade, and "4" is considered below average. "2" is considered better than average.

Q. What are the limits of the grades that are given?

A. "5", I believe, on the low side is considered unsatisfactory.

Q. Do you have a degree of "1"?

A. I don't believe I have ever rated that high.

Q. How about "2"?

A. I have graded "2" in some instances.

Q. What does that mean?

A. Above average.

Q. And "3" is average then? A. Yes.

Q. Now, is there a minimum time required of dual instructions before a person can solo?

A. Yes. I believe at the time that he took his training it was under a CAA approved school, which in this case it was operated, it was eight hours minimum time

(Deposition of Bernard John Oswald.)

of instruction. I believe under non-approved there is that requirement. I would have to look it up.

Q. It is a minimum of eight hours on what, sir?

A. Minimum of eight hours with the flight instructor before they are allowed to make a solo flight.
[26]

Q. And who then determines when a person is qualified to solo? A. His instructor.

Q. Do you recall how much dual time Mr. Price had before he soloed?

A. No, I don't. I haven't added it up.

Q. If I add it correctly, it comes to 20 hours and 35 minutes dual time.

Mr. Reynolds: Off the record.

(Discussion off the record.)

A. There is also a five hour trip to Spokane and back that was in a four-passenger airplane which normally wasn't used for training. But he wanted that—that was all actually training, but it wasn't in a normal course of instruction that they would get. This was a trip, as I remember, to Spokane to see some relatives over there. They were permitted to put that in the record because he was actually flying the airplane. But it would make it appear that he had more time than normal before he made his solo flight.

Q. Was that four hours?

A. Four hours and fifty minutes to Spokane and return.

Q. If my addition is correct, that would make it 15 hours and 40 minutes of dual time before he soloed exclusive of that trip. [27]

(Deposition of Bernard John Oswald.)

A. That is probably pretty close.

Q. And what is the average time that students would solo in?

A. Oh, anywheres from eight to seventeen hours.

Q. And what was this instruction given in, what type of plane?

A. This was given in an Aronca, A r o n c a (spelling), Model 7AC. Though there are—I see there are two other flights too in the larger four-place Cessna, Model 170. There is another one here of 50 minutes, and another one of 40 minutes besides the Spokane trip. He made two other flights in the same airplane that he took to Spokane.

Q. Would you describe the Aronca?

A. It is a two-place training aircraft, tandem seating, and a 65 horsepower engine.

Q. Fixed-pitch prop? A. Yes.

Q. Fixed gear? A. Yes.

Q. What is meant by “fixed-pitch prop”?

A. The propeller cannot be changed in pitch by a control from the cockpit of the airplane.

Q. And how many engine controls, then, are there in a fixed-pitch prop such as the Aronca?

A. Actually there is just your throttle.

Q. And with fixed gear, what is meant by that?

[28] A. Nonretractible.

Q. So the actual controls, then, would be how many in the Aronca?

A. Do you mean the engine controls?

Q. Well, how many controls does a pilot have to master in order to fly a plane of the type as the Aronca?

A. Well—

(Deposition of Bernard John Oswald.)

Mr. Reynolds: I want to throw in an objection on the grounds of relevancy.

Mr. Obenour: I will tie it in later.

The Witness: Do you want me to answer?

Mr. Reynolds: Yes. Go ahead.

By Mr. Obenour:

Q. Yes. You may answer.

A. Well, you have your elevator and rudder and aileron controls, the wheel brakes, the throttle, the carburetor heat control, and the trim tab.

Q. Is there a carburetor control on it?

A. The carburetor heat control is an engine control.

Q. Can you cut off the carburation? How do you control the gas?

A. With the throttle.

Q. How do you cut off an engine?

A. With the switch, an ignition switch.

Q. Is there any mixture control as such in that aircraft? [29]

A. No.

Q. What is meant by "supervised solo"?

A. The solo flight is under the direction and control of the instructor.

Q. Is an instructor in the ship?

A. Not on solo.

Q. How does the instructor maintain control?

A. Just through verbal instructions prior to the take-off.

Q. And this flight instruction of Mr. Price began when, sir?

A. February 22 of 1955.

Q. When did he solo?

A. May 3, 1955.

(Deposition of Bernard John Oswald.)

Q. Thereafter did he continue to receive flight instructions?

A. Yes. He alternated between dual and solo flight training.

Q. How long?

A. Up to what date do you mean?

Q. Yes.

A. August—well, actually July 28, 1955, was his last training flight before his actual flight test.

Q. How much instruction had he received then by July—between February of 1955 and July 28, 1955?

A. I would have to add it up on adding machine here.

Q. Do you recall that you have added it—excuse me? [30]

A. Here it is. Yes. He recieved 43 hours and 35 minutes of dual instruction and 33 hours and 40 minutes of solo flying.

Mr. Reynolds: The total?

The Witness: Total was 77 hours and 15 minutes.

Mr. Reynolds: That is the total time he received up to the granting of his private license both before and after solo?

Mr. Obenour: Yes.

The Witness: Yes.

By Mr. Obenour:

Q. What is the average instruction, dual and solo, on a—that a student would take before he would obtain his private certificate?

A. Oh, I would say anywheres from forty-five hours to eighty hours.

(Deposition of Bernard John Oswald.)

Q. Did you evaluate Mr. Price's proficiency in your instruction before he received his CAA check?

A. Yes.

Mr. Reynolds: I object to this as hearsay or irrelevant, I don't know which.

The Witness: Partially.

Mr. Reynolds: Probably both.

Mr. Obenour: We submit this man from his [31] experience as an instructor is regularly called upon to evaluate his students, and as such he is an expert in this field and qualified to give an opinion as to the individual proficiency of this man.

Mr. Reynolds: Then it is not relevant, because it is too far removed from the date of the accident.

Mr. Obenour: I believe I will tie that up also.

By Mr. Obenour:

Q. Did you form an evaluation of the proficiency of this man?

A. Partially, after my last flight with him. There was another 50-minute dual flight given to him by another instructor. He went through the private pilot flight test sequence. But as I remember, I felt at the time that the student was ready and able to pass his flight test for a private license.

Q. Do you have an opinion as to why Mr. Price would have required 77 hours and 35 minutes instruction before qualifying for a private license as compared to the average, which I believe you stated was 45 years to 80 hours?

A. Well, there was no pressure to complete the course in [32] any special length of time, and as I say,

(Deposition of Bernard John Oswald.)

there is some other miscellaneous flying included in here that normally wouldn't be part of his—wasn't a necessary part of his flight training, which added to the total hours.

Q. Do students vary in their aptitude to flight instruction? A. Yes.

Q. What are the characteristics in the individual that would affect the aptitude of the student?

A. Well, their mental attitude and fear and ability to relax and think clearly are all factors that affect their training.

Q. Does age enter into it?

A. Somewhat from the standpoint of it slows some individuals down slightly. But they are normally more careful pilots, the older pilots.

Q. In receiving instructions does age affect their ability to respond?

A. Not necessarily. It may take a little longer for that ability to become proficient.

Q. Do persons' reactions slow down with age?

A. I think that is an accepted fact, I mean in any type of occupation that reactions slow down. That is a medical record.

Q. In your experience with instructing Mr. Price, did you [33] find that his reactions were slower by reason of his age than if he were a younger man?

A. Yes.

Q. Did that affect the amount of training that he required before he was able to receive his private flying?

(Deposition of Bernard John Oswald.)

A. I would say it did somewhat, although some people are not in a hurry to get their private certificate. They will take the attitude, "I want all the training I can possibly get so I will be a safer pilot when I do get my license."

Q. In the instance of Mr. Price, did that affect the length of his training?

A. I say it did somewhat, yes.

Q. What do you mean by "reaction time"?

A. Well, the ability to recover from—for instance, if a bad landing—it would be the quickest in period of time that it takes them to take action from, say, a bad landing or some other maneuver.

Q. Would this be a reaction to respond to an emergency?

A. Yes, I would say it would.

Mr. Reynolds: I will object to this line of questioning as irrelevant.

Mr. Obenour: We will tie it up.

By Mr. Obenour:

Q. Do you compare this to operating anything such as a car [34] or airplane when you are called upon in the operation to react to certain emergencies or changes in the operation?

A. I don't think you could compare it exactly to an automobile.

Mr. Reynolds: Objected to as leading and suggestive.

A. (Continuing) Because the training time speeds up their reactions.

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Their what, sir?

A. The training that they get will—speeds up their reactions, the ability to recover from an abnormal position or some predicament they may be in. If you want to make it clear, the first time that a student bounced badly on a landing doesn't mean that his reactions are—his reactions may be very slow at that time. He just doesn't know what to do. But with constant bounces and constant landings, his reactions speed up.

Q. And that would be a case of experience?

A. That is right.

Q. If you were then to encounter a circumstance which you had not previously experienced where, by the same token, the reaction would be slower? [35]

A. It could be. It is an unpredictable thing.

Mr. Reynolds: That is all very speculative.

By Mr. Obenour:

Q. If a person faces an emergency in which he had not had previous experience, by that lack of experience the reaction of the individual would be slower would it not, sir?

Mr. Reynolds: Objected to as irrelevant.

A. I couldn't answer that.

By Mr. Obenour:

Q. It is just a definition of bounce-landings where you would improve by having experienced them before?

A. I have seen Boeing test pilots in an emergency make a completely wrong move in an emergency, just the opposite of what they should have done.

(Deposition of Bernard John Oswald.)

Q. So regardless of the experience, a man may respond improperly, is that right, in flying?

A. He may be, yes.

Q. Do you have a saying called "pressing the panic button" or some such thing?

A. Right.

Q. And the greater the inexperience or the less the training, would that affect the reaction of the individual? In other words, the less experienced pilot would be more apt to react slower and in an improper fashion than an [36] experienced pilot, is that right, sir?

Mr. Reynolds: Speculative again.

A. I couldn't answer that because that is something you can't predict what the individual is going to do. One fellow you think, when you simulate an emergency, is going to handle—think he will handle it wrong, and he may actually do the right thing.

Q. Now, did you continue to have contact with Mr. Price after he obtained his private license?

A. Yes.

Q. And in what way?

A. He purchased his own airplane, I believe, shortly.

Q. Where?

A. From a concern in Portland.

Q. What type did he purchase?

A. A Piper Tri-pacer.

Q. Would you describe that?

A. That is a four-place high-wing monoplane of 135 horsepower.

Q. How many people does it carry?

A. Four people.

Q. What type of engine and controls does it have?

(Deposition of Bernard John Oswald.)

A. It had a 135 horsepower engine, a Lycoming engine, with conventional controls. It was a tricycle gear airplane.

Q. What type of propeller? [37]

A. Fixed-pitch propeller.

Q. And landing gear is what?

A. Fixed landing gear, a tricycle gear.

Q. Does it have flaps? A. Yes.

Q. How are they operated?

A. Manually by handle.

Q. Are they multi-placed flaps or how are they controlled?

A. There are two positions—three positions, full-up, half-way position, and the maximum down position.

Q. What are the normal uses of these flaps?

A. Take-offs are normally made without flaps or with half flaps. Landings can be made with the flap in any position, and the normal position—the most used position would be full flaps for landings.

Q. What is the procedure to be followed for an emergency pull-up? First of all, do you know what I mean by “emergency pull-up”? A. Yes.

Q. To clarify, if a person were coming in for a landing and he faced an emergency which would not permit him to land, and you have to go around, what would be the procedure? A. Well, normally—

Mr. Reynolds: May I interrupt for just a [38] second. I believe the record should show in here somewhere that Mr. Obenour and myself and Mr. Oswald are private pilots, or pilots with some amount of experience, and some of the language in both the ques-

(Deposition of Bernard John Oswald.)

tions and the answers may not be quite clear. I am sure none of us have any objection if it isn't too clear at the time. Some of the terms we use are not too clear. I was thinking of your question, "pull up and go around."

Mr. Obenour: I want to go back and rephrase it.
By Mr. Obenour:

Q. Where a person comes in for a landing, and, as you say, the normal flap position is full down, in the tri-pacer what would be the procedure to be followed for an emergency go around where the landing would not be able to be accomplished and where you would have to go around?

A. Well, the normal procedure would be to apply full throttle and then take off the carburetor heat, and then in pilot's terminology you would "milk-up" the flaps.

Q. Can you milk-up the flaps in a tri-pacer, or is it strictly one position or the other?

A. No, you can keep pressure on the handle and ease the [39] flaps up.

Q. Is this what you would term an emergency procedure in flying? A. Yes.

Q. What does the term "emergency procedure" mean in flying?

A. Of course, that procedure could take place without an emergency.

Q. Is it correct that the term "emergency procedure" has some special significance in flying?

A. Yes, it would be an emergency, for instance, if another aircraft got in his way, or—

Q. First of all, the term itself, "emergency pro-

(Deposition of Bernard John Oswald.)

cedure", is it not correct, sir, that it would cover special situations in flying for which a pilot must be prepared to react such as engine failure, a pull-up in landing, change of flight altitude, a stall, a spin, or something of that sort? A. Yes.

Q. And are there prescribed procedures to be followed for these respective emergencies?

A. That is right.

Q. And the procedure you described for milking up the flaps and applying power in the emergency of a go-around, that is such an emergency procedure, is it not?

A. Yes. That would be—in this case the go-around [40] procedure for this particular incident would be the same as an emergency procedure for that particular predicament.

Q. And is this a type of an emergency that would require a reaction by the pilot? A. Yes.

Q. And would the person's reaction to an emergency of a pull-up and a go-around be affected by inexperience or by slow reaction time **generally**?

Mr. Reynolds: Objected to as speculative and irrelevant.

Mr. Obenour: Again, we believe this man is qualified from his personal flight experience and from his flight instructing experience.

Mr. Reynolds: I am not objecting to his competency, just the relevancy, and the fact that it is a little speculative when you start talking about reaction time.

Mr. Obenour: We will tie that up also.

The Witness: Would you give me that question again now?

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. Is this emergency pull-up the type of emergency that would require a reaction by the individual pilot?

Mr. Reynolds: I think he already answered that.
[41]

By Mr. Obenour:

Q. You said yes? A. Yes.

Q. Would this reaction to such an emergency be affected by a pilot's inexperience or by his generally slow reaction characteristics?

Mr. Reynolds: As I say, I think that is too speculative to demand an answer.

A. It could be affected by indecision too. In other words, the ability to make up his mind. After he once makes up his mind to do something, why, then his reaction time would depend on how quickly he performed the proper functions or operated the controls. But indecision can enter—indecision and doubt can enter into a lot of these things, from past experience of waiting too long before they decide to do these things.

Q. And have you evaluated Mr. Price's characteristics as to indecision and to his slowness to react to flight emergencies generally? A. Well—

Mr. Reynolds: Objected to as irrelevant again, because of the removal in time from the date of the accident.

A. Mr. Price was, as I remember, more on the cautious side in things, in landing in short fields which requires [42] sometimes a go-around procedure in cases where he would go around to make sure and where

(Deposition of Bernard John Oswald.)

probably it wouldn't have been completely necessary for him to do so.

Q. That would be indecision, would it not, sir?

A. It would be a decision on the cautious side.

Q. Did you evaluate Mr. Price during your flight instructions as to his being slower to react by reason of his age than the average pilot?

A. I don't—he is a very quick individual, and as I remember, when he was taught the proper thing to do, his reaction was as quick as the average person, I would say.

Q. Have you not said previously that Mr. Price being an older person his reactions would be slower?

Mr. Reynolds: Just a moment. I don't believe Mr. Oswald ever stated that. I believe he was asked a lot of questions about older people in general, but he was never asked whether those particular conclusions applied to Mr. Price or not.

Mr. Obenour: I thought that he had.

Mr. Reynolds: That is not my recollection. It may be so.

By Mr. Obenour:

Q. Did Mr. Price's age enter in his reactions, or did his age enter into the time it took before—the 77 [43] hours and 35 minutes required before he took his private flying?

Mr. Reynolds: I believe he answered that question "yes."

A. That is a very indefinite thing. We have 20-year old students that had a hard time qualifying for their private license and in more hours. Some people

(Deposition of Bernard John Oswald.)

are just naturally slow thinkers and slow to learn. But I would not say that Mr. Price was a slow learner. I think he has a very quick mind.

Q. I am talking about reactions.

A. Yes. Well, as I said before, reactions are something that in flying are trained into the person through constant repetition, and I believe it was possible that *maybe* it took a little more training due to his age to develop these reactions. But as I say, in thinking back over other students, why, some fellows 20 years old took as much time, if not longer, to develop their reactions too.

Q. I believe you stated, did you not, that it is recognized medically, if I recall your testimony, that the man's reactions are slower in older age?

A. That is what you read, yes.

Q. Has that been your experience too in instruction?

A. Flying is such an unpredictable thing. I believe that [44] the Air Force washes out a lot of their cadets on account of slow reactions, as you stated, to emergencies and things of that sort, and age certainly wouldn't have any bearing on that.

Q. Did you give any night instructions to Mr. Price?

A. No.

Q. Did he request it?

A. I believe on one occasion he did request some night instruction, but I was at the time quite busy, and we just took him on a—I remember we made one night flight with his airplane—in his own airplane, a short, local flight over the city, and at that particular time I

(Deposition of Bernard John Oswald.)

even flew the airplane. It was just more or less a little familiarization. Mr. Price lived on Vashon Island and always had to catch a ferry when he was taking his training, and we never seemed to get around to that.

Q. Did you continue to be in contact with Mr. Price at the airport?

A. I would meet him and would greet him as he came out.

Q. Did he fly out of your field?

A. Yes, he kept the airplane in our hanger, and we took care of the maintenance on the airplane for him.

Q. Are you equipped for night flying at your field?

A. Yes. [45]

Q. Did he ever do any night flying?

A. Not at our field other than this one time that I went up with him.

Q. Was there any reason for that?

A. No, it just—we just never did get around to it. Some people are not particularly interested in night flying because they don't consider it safe to fly single engine airplanes at night.

Q. Do you know how many hours Mr. Price had in 19—by 1956?

Mr. Reynolds: Do you want to make that more specific?

Mr. Obenour: I am looking for the date.

Mr. Reynolds: October 18, 1956.

The Witness: No, I don't.

By Mr. Obenour:

Q. Do you know if his flying, as far as you know, other than the one flight at that time, has been out of

(Deposition of Bernard John Oswald.)

the Oswald Flying Service—or out of the Tacoma Airport?

A. No. He had made a number of other cross-country flights with his airplane.

Q. But he maintained his airplane at Tacoma flying field, did he not?

A. Tacoma Airport, yes.

Q. Now, did you discuss a proposed cross-country that Mr. Price was undertaking around October of 1956? [46]

A. Yes.

Q. And what discussion did you have with Mr. Price about this plane?

A. Well, I helped him plan his course and also in assistance with the Aircraft Owners' Association. He had written—he was a member of the Aircraft Owner and Pilot's Association and had written to them as to the best route to take on this trip, and what maps and—he requested their flight planning service in his behalf on this trip he was planning.

Q. What information was furnished to him?

A. They advised the best routes, usually in the form of a letter, and I believe they recommend what maps to use, which flight charts to use, and give him hints and warnings about mountain flying and things of that sort.

Q. I believe you stated that night—there is a rating for private flyers as to night flights?

A. An individual private pilot would not be prohibited from taking up his airplane at nighttime anytime he wanted to, but if he is going to carry any

(Deposition of Bernard John Oswald.)

passengers on those flights, he has to have five take-offs and landings made at night one hour after sunset, and that [47] is within the preceding ninety days.

Q. What are the requirements as to night flights?

A. No, there is no rating.

Q. To your knowledge had Mr. Price had such night landings? A. No.

Q. Did you discuss night flying with Mr. Price preparatory to this flight?

A. We discussed it in the sense that all of his flying should be done in the daytime.

Q. When did this conversation take place?

A. I believe on two or three occasions we went over the course and navigational facilities and so on and part of the general planning of the trip.

Q. When did this conversation take place?

A. I advised him against any night flying.

Q. What did you tell him concerning night flights?

A. I advise him against any night flying.

Q. Why?

A. For the reason that he would be over unfamiliar country and his lack of training in night flying.

Q. What is the difference between night flight and day flight?

A. There is a considerable amount of difference in being able to estimate altitudes and distances, orientation, and things of that sort.

Q. Is there any difference in landings?

A. Difference in landing, yes.

Q. What is the difference in night landing than day landing?

A. They have to learn to develop a judgment as to

(Deposition of Bernard John Oswald.)

their [48] height and position in relation to the runway.

Q. Is there any question about orientation at night with the runways themselves as distinguished from day?

A. Most people have some—have little more difficulty in lining up with the runways because it has to be done by reference to lights.

Q. Is this a matter that would require any experience or instruction in familiarization with the manner of lighting of the runways themselves?

A. Yes, it would. Some number of people I have known do a lot of night flying but never have had any instruction whatsoever from the flight instructor on night flying. It is something they develop themselves.

Q. Is there a pattern of lighting on an airport runway at night?

A. There is different patterns.

Q. What are those—what do they consist of?

A. Some airports merely have boundary lights. Some have runway or strip lights, they call them, and some have high-intensity lights and approach lights.

Q. Do you have lights marking the ends of the runways?

A. Normally there is a prescribed pattern on municipal airports. Some of the smaller private fields will not have any particular pattern of lights on the ends of the runways. They will just have white lights all the way down. [49]

Q. Are you familiar with the airport at Phoenix?

A. I have been in and out of there for one landing and take-off in the daytime.

(Deposition of Bernard John Oswald.)

Mr. Reynolds: If I may interrupt, Mr. Obenour, I believe there are several airports in Phoenix.

I think the one we are referring to is Sky Harbor.

By Mr. Obenour:

Q. Are you familiar with the Sky Harbor Airport?

A. Yes, sir, one flight in and out of there.

Q. Are airports rated by flight manuals as to the type of lighting and so forth that they have?

A. Yes.

Q. Such things as field elevation, direction of the runways, light facilities, and things of that sort?

A. In the Airmen's Guide, yes.

Q. Was Mr. Price familiar with the Airmen's Guide?

A. I am sure he was.

Q. And in the Airmen's Guide is there not a map showing each airport, each rated airport, if you want to use that term, as to the airport facilities, direction of runways, lighting facilities, and so forth?

A. There is no map. It is just a written description by code.

Q. The information is shown, is it not, for what facilities [50] at each respective airport?

A. Right.

Q. And does an airport itself have some distinctive beacon light that can be identified as to the location of the airport?

A. Yes, a rotating green and white beacon. I would say again that that is used only on the airports—well, an airport such as ours does not have a rotating beacon.

Q. Now, is there any practice that is followed in

(Deposition of Bernard John Oswald.)

flying as to coming into a strange airport at which you have never landed or are not familiar?

A. Do you mean at night?

Q. Day or night.

A. You would make normally some effort to know a little something about the airport, the radio frequencies, if they have a control tower, and the normal procedure there would be to contact the control tower anywhere from possibly five to ten miles out from the airport and get landing instructions. If there was no control tower, you would probably circle the field a little higher than the normal pattern altitude and check the wind direction and your approaches and so forth.

Q. How do you locate yourself with an airport with which you are not familiar?

A. Usually by radio or visual aids. [51]

Q. Visual aids, what do you mean by that?

A. Well, by visual aids it would be locating the airport in relation to the—to its position on the map and its position in relation to the particular town or city.

Q. That would be preparatory to take-off, would it not, from a map itself or as you are approaching from a map?

A. If you are approaching this airport, yes, you would—usually you will plot your course and draw your line on the map right to the airport itself and fly that course to the airport.

Q. At which time you would familiarize yourself with the location of the airport in relation to the city, is that right, sir? A. That is right.

(Deposition of Bernard John Oswald.)

Q. Now, what is the area that is subject to airport control?

A. Well, that depends on the particular type of airport. If it is a control tower, if the airport is under a control tower, why, all of the traffic in the immediate vicinity of the airport with intentions of landing and taking off is controlled by the control tower, though you can fly directly over the top of the airport at a higher altitude without any contact with the control tower.

Q. Yes, sir. And what is the procedure that is followed [52] preparatory to landing in regard to radio contact?

A. Well, usually the—normally if you are using radio facilities, why, you would close your flight plan with the appropriate CAA facility, and then you would transfer over to the tower radio frequency and make the initial call and tell them your approximate position away from the airport and then ask for landing instructions.

Q. How do you determine your position in relation to the airport?

A. Oh, usually it is stated in terms of such as five miles southeast at three thousand feet, or something of that sort.

Q. Who determines the position in relation to the airport?

A. You do yourself.

Q. How do you do that?

A. It is just an estimate of your position. That is done when you have the airport in sight for visual flying.

(Deposition of Bernard John Oswald.)

Q. When you have the airport in sight?

A. Yes.

Q. Now, what is the procedure that is followed in order to establish the location visually of the airport?

A. Well, that is part of your navigational procedure is your approaching the city you should be able to pick out your land marks, rivers, railroads, and other towns, and [53] so forth, so that you know that that course is going—is taking you right to your destination.

Q. Whose responsibility is it to locate the airport itself?

A. It would be the pilot's responsibility.

Q. Whose responsibility would it be to locate himself in regard to the airport?

Mr. Reynolds: I object to this as irrelevant, immaterial, and incompetent.

A. Would you say that again?

By Mr. Obenour:

Q. Whose responsibility is it to locate the airport itself in approaching for a landing?

Mr. Reynolds: That calls for a conclusion of the witness.

A. I would say it was the responsibility of the pilot, but there are occasions when you will need the help of the control tower operator in locating the airport.

By Mr. Obenour:

Q. What is the normal procedure to be followed in landing at a strange field, actually, when you are at the field itself?

A. Well, the procedure wouldn't be any different

(Deposition of Bernard John Oswald.)

unless the pilot was having trouble—having trouble of some kind. He would just land on the runway that was designated by the tower operator. [54]

Q. How do you locate a runway?

A. It is given by a number which refers to the magnetic heading of the runway.

Q. Do you not have to actually have visual contact with that in order to line up for your approach?

A. Yes, you would.

Q. And in coming into a strange field is it not the normal practice to over-fly an airport and get your actual bearings in regard to the airport and its landing strip that you are going to use?

A. Not actually. Sometimes you may be flying into an airport on a heading that is very—on a magnetic heading that is very close to the magnetic heading of the designated runway that the tower operator will clear you in for a straight-in approach.

Q. But in order to actually locate that runway on a strange airport is it not the normal procedure to fly onto the airport, locate the runway, and then make your downwind leg?

A. You would fly in and start a circle of the airport. As I said before, it is possible to be cleared straight in in a strange airport.

Q. But would you land straight in if you did not see the airport or the runway?

A. No, that would be—[55]

Q. Any clearance you would get from the tower would still be prefaced on your visual contact with the field and its runway, would it not?

(Deposition of Bernard John Oswald.)

Mr. Reynolds: Objected to as immaterial, irrelevant, and incompetent.

A. That would be up to the pilot. I have had occasions where they have cleared me for a certain runway and which I couldn't define—an airport had some runways I couldn't define which one they meant on a strange airport, and I asked them to explain it to me further, and in the process it might mean another circle around the flight pattern to decide actually which is the correct runway to use.

By Mr. Obenour:

Q. In order to make a night landing it is necessary for you to visually get your bearings without excluding any instrument approaches or anything of that sort?

A. Yes, that is right.

Q. But for a C.A.V. night landing, it is necessary for the pilot to visually line himself up with the runway he intends to use, is it not? A. Yes.

Q. And it is necessary for him to identify the airport and its proposed runway, is it not?

A. That's right. They usually turn the runway lights on [56] on the runway that is in use, which helps the pilot to identify it.

Q. Now, to your knowledge Mr. Price had had no such experience, had he? A. No.

Mr. Reynolds: Object to the form of the question. I believe Mr. Oswald's testimony was that he didn't know of any experience.

Mr. Obenour: The question was as to his knowledge.

Mr. Reynolds: Well, I think the question is a little

(Deposition of Bernard John Oswald.)

unclear. Are you asking him if he knows whether Mr. Price has no night flying, or are you asking him with regard to any night flying that he knows Mr. Price has or doesn't know he has?

By Mr. Obenour:

Q. Do you know whether or not he had any night flying experience?

A. I believe that there had been times when he had been up quite close to being dark. I don't believe he had ever been up later than the official designated time of darkness as the CAA says it is, one hour after sunset. I don't think he had ever been up that late before.

Q. Now, I believe you stated you discussed night flying with Mr. Price. What did you tell him that he should [57] do in regard to his proposed cross-country?

A. Well, I advised him that he should not do any night flying.

Q. Why?

Mr. Reynolds: Objected to as redundant.

A. I didn't give him any reason why. It is just the fact that I had never given any training to him for night flying, and I was looking—in other words, conscious of his—of the safety of his trip.

By Mr. Obenour:

Q. Did this tri-pacer have any landing lights?

A. Yes.

Q. Now, did you discuss this accident that Mr. Price had on October 18, 1956, with Mr. Price?

A. He told me about it when he got back, yes sir.

Q. Where was this?

A. He stopped by the airport.

(Deposition of Bernard John Oswald.)

Q. About when?

A. I believe several—I don't remember just how long it was. I know he was still under medical treatment when he got back.

Q. What is your best recollection as to when this took place?

A. Oh, I would say it was within two weeks after he arrived back in Tacoma. [58]

Q. And who was present at the time?

A. I believe it was just—that has been so long ago. It may have been Mr. Cunningham that was with him. I believe he was with him too, and I believe Mrs. Price was there also. He was a frequent visitor at the airport. He stopped in quite often.

Q. Now, what conversation did you have with Mr Price about this accident?

A. Oh, as I remember, he described to me what had happened out there.

Q. What did he tell you?

A. Well, he said—

Mr. Reynolds: That is objected to as hearsay.

A. I can't remember his exact words due to the length of time that has elapsed, but—

By Mr. Obenour:

Q. What is your best recollection?

A. The best recollection I have is that they were flying from El Paso to Phoenix on a flight plan, and that he arrived near Phoenix just a little later than he expected, but it was still daylight. He said it was still daylight when he arrived over Phoenix, but that the control tower operator wouldn't let him come in and

(Deposition of Bernard John Oswald.)

land immediately due to heavy other traffic around the airport. My impression was that he felt that the [59] control tower operator kept him out too long and it was gradually getting darker all the time.

Q. What did he tell you?

A. Well, those are—that—

Mr. Reynolds: My objection as to hearsay goes to all of this, incidentally.

A. That is the gist of what he told me, and he said he advised the tower that he was unfamiliar with this area and needed help in getting in.

As I remember, he was flying around in the vicinity of the airport and thought he had the runway in sight, and the control tower operator asked him if he had the runway in sight, and he saw these lights which he thought were the runway, and he told him he did have the runway in sight, and the tower operator told him he was cleared to land.

He said when he was approaching these lights he turned on his landing lights and suddenly saw some buildings and poles in front of him and attempted to pull up but that the left wing clipped the top of a pole and pulled them on into the ground—on into this shed in the stockyards.

Q. Do you recall, sir, for the purpose of refreshing your recollection, you were contacted by a Special Agent of the Federal Bureau of Investigation on January 26, [60] 1959, at your office? A. Yes.

Q. Roy G. Sjostrand, S j o s t r a n d (spelling)?

A. Yes.

(Deposition of Bernard John Oswald.)

Q. Do you recall at that time you were asked questions about this same matter? A. Yes.

Q. And do you recall at that time any statement you gave him, Mr. Sjostrand as to the fact that you had not given any night flight instructions to Mr. Price?

A. No, I don't. I remember he wanted to see Mr. Price's records. I showed him these records here (indicating).

Mr. Reynolds: You are referring to Exhibit A, Mr. Oswald?

The Witness: Yes.

A. (Continuing) And I can't remember definitely anything about our conversation. I believe it was more or less generalized as to what more or less surrounded what his flight experience had been or what training he had had.

By Mr. Obernour:

Q. Do you recall at that time you made a statement to the Special Agent that Mr. Price being older, his reactions were slower than the average pilot?

A. No, I don't remember that. [61]

Q. Could you have?

A. He didn't write anything down as I remember. Maybe he did make a few notes. I don't remember. I could have told him that.

Q. And do you recall that you told him that Price wanted to do some night flying but you had discouraged it because his ability to fly appeared to be slower than for the average pilot?

A. No, I don't remember that.

(Deposition of Bernard John Oswald.)

Q. Could you have?

A. I could have said that, yes.

Mr. Reynolds: I object to all of these questions. You are cross-examining your own witness, Mr. Obenour.

Mr. Obenour: For the purpose of refreshing his recollection as to the interview.

Mr. Reynolds: That is a neat trick, but I don't think it can be done that way.

By Mr. Obenour:

Q. Now, assuming that a pilot in approaching a strange field, would the normal procedure not require that he orient himself visually by the runway he was to use? A. He would, yes.

Q. And assuming that a pilot in a night landing were on an approach and you were to find he had undershot the [62] runway, and that he then would have obstruction, what would then become visible to him, would this then require the emergency procedure which you have previously described for a pull-up and go-around? A. Yes.

Q. And would the reaction to such a situation that I have just described, Mr. Oswald, of the individual pilot be affected by his experience and his normal reaction time?

A. Well, that is a difficult one to answer because if he had any experience in night flying, he would be able to define all those things ahead of time. He could see the obstructions would be lighted. I think that the case of being in doubt would stimulate a reaction to go around again.

(Deposition of Bernard John Oswald.)

Q. Then, if I understand you, the fact of his experience, would that have come into the predicament in the first place rather than—

Mr. Reynolds: All this is speculative. I don't think it is admissible.

By Mr. Obenour:

Q. Then, if I understand you then—

A. Inexperience—yes, inexperience with night flying was—would be the underlying cause of getting into a predicament. Anybody would know that, any pilot.
[63]

Q. So the man's inexperience would have created the predicament in the first place, is that right, sir?

Mr. Reynolds: Objected to as speculative.

A. Of course, the location of the airport could have something to do with it. In my experience I have had trouble locating airports at nighttime also, and especially in big cities.

Q. Yes, sir. And the normal procedure would be to establish your actual position with the runway visually before coming into a landing position from which you could not recover, would it not?

A. My method would be to have the airport identify themselves by turning up the intensity of their lights or turning on the instrument approach lights, if they had any, at the airport, and then the tower operator should identify the airplane in question by having him turn his landing lights on to see if he can spot the airplane and guide the pilot into the field.

Q. When the tower operator has been advised the

(Deposition of Bernard John Oswald.)

pilot has the runway in sight, is there any responsibility then on the tower operator to control that aircraft?

Mr. Reynolds: Objected to as speculative and incompetent.

A. I don't know what the—just what responsibility the CAA places on the tower operator in cases like that. [64]

Q. Whose responsibility is it for the safety of an aircraft?

Mr. Reynolds: All these questions with regard to responsibility call for a legal conclusion.

Mr. Oswald is certainly an expert, which I will readily concede, but I don't think he is competent to say what responsibility rests on the tower operator. That is what this action is all about.

Mr. Obenour: The normal practice of flying, I believe, pertaining to this.

Mr. Reynolds: Ask him what the normal practice of flying is. That may be or may not be what his legal responsibility is.

By Mr. Obenour:

Q. In the practice of flying whose responsibility is it for the safety of the aircraft?

Mr. Reynolds: Subject to the same objection.

A. In a controlled airport it is probably a dual responsibility with the pilot and the control tower operator, because you have to follow his instructions.

Q. And the instructions consist of what?

A. Of the tower operator as to the runway you are to land on. If you don't, you are violating the

(Deposition of Bernard John Oswald.)

Civil Air regulations, that is, if you don't obey his orders.

Q. And the instructions would be as to a particular runway to land on, would it not? [65]

Mr. Reynolds: Objected to as speculative.

A. I didn't get the last sentence.

By Mr. Obenour:

Q. Those instructions to which you have been referring would be as to the particular runway to use, would it not?

A. Yes. The particular runway to use and your position in the pattern too, and your landing sequence in relation to the airport and other aircraft.

Mr. Reynolds: Also irrelevant, incompetent, and immaterial, as to what action happened in this particular instance.

By Mr. Obenour:

Q. In the normal course of flying over and above the instructions that you are given as to which runway to use and the position in traffic, who determines the actual operation of the airplane?

A. Actually the pilot can place more responsibility on the control tower operator. I have been in predicaments myself where I have had to ask for their help in locating the airport, and they would even tell you where to make your turns. Actually they would tell you when to turn and where to make your turn even. It is up to the pilot to decide whether he wants to land. He can at any time tell the control tower that he is going to abort the landing, and he can leave the

(Deposition of Bernard John Oswald.)

airport—the [66] area and decide to go to another airport if he wants to do that.

Q. Who is in control of the airport on its approach, the actual physical operation of the airplane?

A. Well, the pilot is actually physically operating the airplane.

Q. And in normal flight practice in a night landing, is there any procedure to follow on a strange field as to your position on the runway that you would land on?

A. Sometimes the tower operators are very helpful in giving information about avoiding obstructions or telling you to be sure and watch out for a particular tower or building or something off to the end of the runway, or something of that sort.

Q. Is there a normal practice as to having the runway actually in your landing lights on your approach before you **set down**?

A. Normally the landing lights on these smaller planes don't—they don't show up very much. They are not of high enough intensity. But actually all you can count on them doing is showing the runway or the ground as it looms up for the last—for about the last fifty feet of altitude is about the most use that you get out of your landing lights on these light aircraft.

Q. With the landing lights on this light aircraft are you [67] actually able to see the runway itself in the lights before you begin your flare-outs?

A. Yes, you can in the areas from a hundred feet on down, why, they will pick out the runway. You can actually see the runway.

(Deposition of Bernard John Oswald.)

Q. And in approaching a strange field is there not a normal practice to follow of a type of dragging approach that would permit you to actually see the runway in your lights before you would descend to this elevation below a hundred feet and begin your landing itself?

A. Normally you will find approaches made in reference to the runway itself and judging your angles from your aircraft to the ground. There is no particular it is more or less just a judgment of altitude. Your altitude is not judged by your altimeter for your last phases of your approach, and then normally the runway lights are turned on on your final approach so that they will help you in—I think in light aircraft to determine your actual height above the ground. But they have nothing to do with your position along the runway or your height above the airport.

Q. But now the question was, in a strange-field approach for night landing, would not the normal procedure be to maintain your altitude until you actually had visual contact with the runway before descending the [68] last hundred feet into your flare-out and actual landing?

A. Yes, that is right.

Q. And had this—

Mr. Obenour: That is all.

Mr. Reynolds: Are you through questioning?

Mr. Obenour: Yes.

Cross-Examination

By Mr. Reynolds:

Q. Mr. Oswald, what certificates and ratings do you presently have?

(Deposition of Bernard John Oswald.)

A. Commercial pilot certificate with single and multi-engine land flight instructor and instrument.

Q. You said flight instructor and instrument?

A. Yes, that is a rating.

Q. Now, Oswald Flying Service also provides a ground school, does it not? A. That is right.

Q. The Tacoma Airport is also popularly known as the Oswald Field, is it not? A. Yes.

Q. Although that is not its proper name?

A. No.

Q. Now, this exhibit which we have introduced along with [69] this deposition—which Mr. Obenour has introduced along with this deposition, this only shows such instruction as Mr. Price may have had through the issuance of his private certificate, is that correct? A. That is right.

Q. It wouldn't show any flying after that?

A. Normally we don't keep these records after they obtain their certificate.

Q. Is it possible that there was some—that Mr. Price had some flight experience prior to the granting of his private certificate that does not appear on those worksheets of yours? A. It is possible.

Q. Mr. Oswald, is there any particular requirement in the regulations of the CAA as to how many hours a private pilot must have before he can attain a private pilot's certificate?

A. The minimum number of hours on a—in an approved flying school are 35 hours before he can take his flight tests, and it is 40 hours on the non-approved flying school.

(Deposition of Bernard John Oswald.)

Q. In your experience do most pilots complete—I am sorry, strike “complete”—do most pilots obtain their private certificate within 40 hours? A. No. [70]

Q. As a matter of fact, only a very few of them would obtain it within 50 hours, is that right?

A. That is right.

Q. And isn't it quite often true that a pilot will have over a hundred hours before he actually obtains his private certificate not because he isn't ready but merely because he doesn't bother?

A. That is true.

Q. Would you consider Mr. Price's number of hours of flying before he obtained his private certificate as abnormally long? A. No.

Q. Now, there was some testimony on your examination by Mr. Obenour as to emergency pull-ups, and I believe we defined it.

Am I correct in saying that most of Mr. Price's training prior to his obtaining his private certificate was in an Aronca 7A3? A. 7AC.

Q. 7AC? A. That is right.

Q. That is commonly known as an Aronca Champion? A. That is right.

Q. As I recollect it, you stated in the tri-pacer the normal emergency pull-up procedure was to give it full [71] throttle, take the carburetor heat off—

A. Yes.

Q. —and ease the flaps up? A. Yes.

Q. Now, how does that differ from the emergency pull-up procedure in an Aronca Champion?

(Deposition of Bernard John Oswald.)

A. The only other consideration in an Aronca Champion would be that you do not have any flaps.

Q. In other words, everything would be the same?

A. Yes, everything the same.

Q. Except for the flaps? A. Yes.

Q. Did you ever give Mr. Price any instruction after he obtained his private certificate in the operation of the tri-pacer? A. Yes.

Q. Did you check him out in it?

A. Yes, I did.

Q. Did you give him the emergency procedure for pull-up? A. Yes, I am sure I did.

Q. Including the fact that he had to ease the flaps off? A. Yes.

Q. Now, tell me, why is it that in an emergency pull-up procedure in an aircraft with flaps you must ease the flaps up rather than simply knocking them up very quickly, [72] "dumping" them is the technical term, I believe?

A. Sudden movement of the flaps upwards causes a loss of lift and will cause the airplane to settle and not be able to climb as quickly.

Q. However, in order to get maximum climb it is essential that you do get your flaps up, isn't that right? You can't—let me rephrase the question.

The maximum rate of climb with full flaps is less than the maximum rate of climb with no flaps at all, is that right? A. That is right.

Q. Now, on your examination by Mr. Obenour there was a lot of discussion of reaction time and various factors affecting it.

(Deposition of Bernard John Oswald.)

Mr. Obenour brought up age. It is also true, isn't it, that in flying an aircraft there are any one of a myriad of things which can affect reaction time in a particular individual at a particular time?

A. That is right.

Q. He may be a little tired, and he may at that particular time or moment have an itch on the side of his nose which he is scratching? A. Yes.

Q. As a matter of fact, reaction time would be some slowed by insects in the cockpit, would it not?

A. That could be true, yes. [73]

Q. Now, Mr. Oswald, you testified that you went over the general outline of Mr. Price's trip which culminated in the accident which this lawsuit is about.

Can you tell us just in general terms where that trip went?

A. Yes. He was going from here to New York City with Mr. Cunningham and Mr. Cunningham's wife to attend the marriage of Mr. Price's son, I believe, in New York, and then they intended to fly on down the eastern coast line in a southerly direction, and then cut across through Louisiana, and then with a short jaunt down into Mexico. I believe they went through Brownsville, Texas, on a short jaunt on into Mexico, and then came back on up, and they intended to go on through El Paso and Phoenix and on towards San Francisco and on up continuing their trip that way home.

Q. In other words, if this flight had taken place as planned, Mr. Price would have flown from here to

(Deposition of Bernard John Oswald.)

New York, and from New York into Mexico, and from Mexico back up into Arizona? A. Yes.

Q. Before they had this accident? A. Yes.

Q. Now, there was—oh, yes, was Mr. Cunningham a licensed pilot at the time of this trip? [74]

A. No.

Q. Had he had any hours of instructions leading towards that objective, to your knowledge?

A. Yes, he had had some instruction in Mr. Price's airplane as I recall.

Q. Had he soloed?

A. No, I believe not.

Q. Had he had any cross-country instruction in the aircraft itself?

A. No. He may have ridden with Mr. Price or myself on one or two short cross-country trips.

Q. But you don't remember whether he did or not?

A. I can't remember.

Q. Now, there was some discussion of normal practices in making landing at strange airports, particularly at night. My questions here will be directed only towards those airports which have control towers.

Isn't it normal practice when landing at any airport, strange or not, which has a control tower, to follow the instructions of the control tower?

A. Yes.

Q. And as a matter of fact, doesn't the CAA request pilots to contact control towers at airports to which they are going if they have trouble locating the airport and call on the control tower for assistance in locating [75] the airport in making a landing?

A. Yes.

(Deposition of Bernard John Oswald.)

Q. As a matter of fact, isn't it true that most flight instructors as a general practice very carefully instruct their students when flying into airports that have control towers to do just exactly that?

A. That should be part of the instructor's training program.

Q. In your opinion—

A. The CAA themselves usually advise the pilots never to be bashful in asking for help when they have any problems on their—using a radio to ask for help when they have any problems either enroute or at their destination or the airport they are landing at.

Q. Now, Mr. Oswald, does the Airmen's Guide, which was referred to several times on direct examination, give the pattern of landing lights at a particular airport? A. No.

Q. Mr. Oswald, what is the altitude above sea level of Oswald Field or Tacoma Airport?

A. 375 feet.

Q. And how many runways does that airport have?

A. Well, at the present time we have only one usable runway.

Q. What runways did it have prior to October 18, 1956? [76]

A. It had two runways.

Q. And what kind of surface were those runways?

A. At that time it was just oiled gravel.

Q. Is the surface any different now?

A. Yes. It is oil mat surface now, the one runway.

Q. Tell me, from the beginning of Mr. Price's private training until October 18, 1956, were both runways in common use?

(Deposition of Bernard John Oswald.)

A. The original short runway was only used occasionally at that time.

Q. What are the lengths of those two runways?

A. The longest runway is 2425 feet, roughly. The shorter runway was, I believe, 2158 feet.

Q. Now, the runway which you spoke of a moment ago, the main runway, would be the 2425 foot one?

A. Yes.

Q. Is your airport equipped with lights?

A. Runway lights, yes.

Q. Does it have a rotating beacon?

A. No.

Q. What color are those runway lights?

A. They are white with—the four lights across the end are red, and the two lights lining with the runway are green.

Q. And how far are those lights apart lengthwise of the runway? [77]

A. Three hundred feet.

Q. And how far are they apart crosswise of the runway?

A. Somewheres between 250 and 300 feet.

Q. Now, I believe you said you landed at the Sky Harbor Airport in Phoenix on one occasion?

A. Yes.

Q. Was that a night landing?

A. Daytime.

Q. Are you personally familiar with the lighting facilities at the Phoenix airport?

A. No.

Q. Can you tell me from the Airmen's Guide what kind of lighting facilities they have?

(Deposition of Bernard John Oswald.)

A. It is just designated as runway or strip lights in the Airmen's Guide.

Q. Do they designate how bright they are or what intensity they are?

A. I believe—I am referring to the current Airmen's Guide. Do you want me to look that up?

Q. You may if you like, if you have it with you?

A. I believe that the intensity can be determined.

Q. First of all let me ask you, what is the Airmen's Guide, Mr. Oswald?

A. It is a booklet put out by the FAA and issued every two weeks, which includes information as to all their [78] navigational facilities and airport directory, and lists of obstructions to air navigation, and any hazard that the pilot might run into. It lists the changes and additions or deletions in the radio facilities, both at the airports and along the airways, and it lists changes in civil air regulations, and practically all the information that a pilot needs for a cross-country flight.

Q. This is an official publication of the Federal Aeronautics Administration, formerly the Civil Aeronautics Administration? A. Yes.

Q. All right. Now, will you tell me what information the Airmen's Guide gives about the airport at Phoenix?

Mr. Obenour: Excuse me, what is the date of the document you are looking at?

The Witness: This is the July 7 issue. The latest issue is September 15.

(Deposition of Bernard John Oswald.)

By Mr. Reynolds:

Q. Both 1959?

A. Yes. The airport information comes out only every quarter. That issue comes out every three months, and then the others are—this is the main volume, and these are supplemental ones. The next full issue comes out and these two will be obsolete, and they keep [79] adding and revising to the main issue all the time.

Mr. Obenour: I object to this as being subsequent in time as to October 18, 1956, to the degree they will vary from the then current Airmen's Guide would not be relevant in this matter.

Mr. Reynolds: All right. Fine.

By Mr. Reynolds:

Q. Go ahead, please.

A. This issue shows high intensity runway lights.

Q. Now, tell me how would those lights differ from yours?

A. They would be much stronger and visible through haze and fog, and the intensity of the lights can be controlled from the control tower.

Q. Now, before I ask my next question, Mr. Oswald, is your airport used by airlines, either scheduled or non-scheduled? A. No.

Q. Would the spacing of the lights in Sky Harbor Airport be different from yours considering the fact that it is a municipal airport which is used by airlines?

A. Yes. I am sure their light system would be set up according to standards approved by the FAA.

(Deposition of Bernard John Oswald.)

Q. Would your airport at night appear different to a pilot in the air from the Sky Harbor Airport? [80]

A. Yes.

Q. Would it be harder to find? A. Yes.

Q. Would the lights appear a good deal dimmer?

A. Yes.

Q. That is, the runway lights.

A. The runway lights are of a low-intensity type.

Mr. Obenour: Objection to this line of questioning. There is no basis—no proof in this matter that there was any experience in night flying with Mr. Price.

Mr. Reynolds: I believe Mr. Oswald testified he took Mr. Price on a trip and landed him at his own airport. In any case, he answered the question, hasn't he? May I ask the reporter if he answered the question?

The Reporter: Yes.

By Mr. Reynolds:

Q. Now, Mr. Oswald, in landing an aircraft at night on a runway which has lights, can you ever actually see the surface of the runway itself?

A. Not unless it is a moonlight night.

Q. This would be true even though the aircraft had landing lights? A. Yes. [81]

Q. And the landing lights were on?

A. Yes.

Q. Is that right?

A. Well, you should be able to see the—with the average small aircraft you should be able to see the surface of the runway from—depending on the angle the airplane is approaching to the airport, probably from a hundred feet to two hundred feet. If they are

(Deposition of Bernard John Oswald.)

approaching at a flat angle, why, the lights wouldn't pick out the runway as quick as if they were coming in at a steeper angle.

Q. Now, Mr. Oswald, let us assume that there is an obstruction of some sort of a not very substantial nature, let us say a pole or a post sticking up out of the runway, and the runway lights pick out the obstruction in what you say is the normal distance you can see with runway—with landing lights on, and you go through the emergency procedure for pull-up, would it be possible normally for an aircraft such as a Piper tri-pacer to clear that obstruction in that space, assuming you go through the normal emergency procedure?

A. It is pretty hard to answer that question.

Q. Do you mean you couldn't express an opinion on whether he could or not? [82]

A. It would depend on how quick you spotted it.

I don't think I could express an opinion on that.

Q. In other words, it may be entirely possible for a pilot to go through this emergency procedure as soon as it was physically possible for him to see the obstruction and not clear the obstruction, is that right, sir?

A. Oh, yes.

Mr. Reynolds: No further questions.

Redirect Examination

By Mr. Obenour:

Q. However, with proper experience a pilot would not be put in a position where that obstacle would have created a hazard in the first place, isn't that right, sir?

(Deposition of Bernard John Oswald.)

Mr. Reynolds: Pardon me, I didn't get the question.

Mr. Obenour: Read it.

(Whereupon the last question was read by the reporter.)

Mr. Reynolds: I will object to that as being vague and indefinite.

A. Any obstructions on an airport are supposed to be lighted as such, any poles or any surrounding an airport. [83]

By Mr. Obenour:

Q. But an experienced pilot would have avoided them, is that right?

Mr. Reynolds: Arguing with his own witness.

A. With experience, yes. The pilot should be conscious of obstructions around an airport and take every means to avoid them. I think that even without experience I think that probably he is conscious there would be obstructions around the airport, buildings, and so on, that you would worry about.

By Mr. Obenour:

Q. In this emergency pull-up that you described, what is the effect of attempting to pull-up that you raising your flaps?

A. The airplane would be able to climb, but the rate of climb would be slower.

Q. Would it create a tendency to mush?

A. Yes.

Q. And by "mush" you mean—

Mr. Reynolds: Explain the term.

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. What is meant by the term "mush"?

A. The airplane is—would be proceeding through the air without gaining any altitude, and it is usually associated with the possibility of a stall. [84]

Q. So that improper emergency procedure would—first, if flaps were not pulled up and power were applied, what would be the reaction?

A. Well, if the airplane has an excess of flying speed, full flaps will tend to give a momentary surge of lift, but which will be quickly dissipated due to the high resistance that the flaps offer to the air flow.

Q. Then?

A. But there could be a momentary surge of fairly fast climb.

Q. But if it is a landing position on an approach and power is applied—first of all, normally what is the rate of approach in relation to the normal flying speed of an airplane?

A. Well, in this particular airplane—

Mr. Reynolds: Which particular airplane are you talking about, the tri-pacer?

The Witness: The tri-pacer. The normal approach would roughly be about eighty miles an hour.

By Mr. Obenour:

Q. What is the stalling speed?

Mr. Reynolds: Let's explain that too.

A. The stalling speed, I believe, in that airplane is roughly about fifty miles an hour. [85]

(Deposition of Bernard John Oswald.)

By Mr. Obenour:

Q. What is meant by "stalling speed"?

A. That is when the air speed of the—the forward or air speed of the airplane is reduced to such an extent the wings will no longer maintain flight.

Q. Are there different stalling speeds on an aircraft?

A. Yes, depending on the configuration of the airplane whether the flaps are down or up or whether power is being applied or not.

Q. And in a normal approach, the tri-pacer speed of eighty miles an hour, what are the different reactions that would occur from a normal emergency operation and then a failure to follow the normal procedure?

A. Well, roughly about sixty-five miles an hour on the airplane would begin to settle and then when the air speed dropped to fifty or below, there probably would be a complete stall which would cause the nose of the airplane to drop.

Q. And if on this approach the flaps are raised suddenly, what would happen?

A. It would cause the airplane to settle unless the pilot compensated for it by pulling up the nose if he had enough reserve speed to do it.

Q. Without the reserve speed what would happen?

A. The airplane would settle. [86]

Q. And if this emergency arose as a result of an obstacle which was in the path of the aircraft and

(Deposition of Bernard John Oswald.)

higher than the aircraft, what would happen by the sudden raising of the entire flap?

A. Well, it would probably cause the airplane to settle then.

Q. And it would not clear the obstacle, is that right? A. Yes.

Q. What would happen if you failed to raise the flaps at all?

A. Well, the airplane would just—are you—are you applying flying power?

Q. Yes.

A. With that particular airplane you can still climb with full flaps on. The rate of climb would be slower over a period of time.

Q. You referred to a mushing, what is that?

A. Well, “mushing” would be—I mean that depends on whether you are making an approach or climbing out.

Q. I am speaking of the emergency procedure.

A. On the approach, why, he would be—in other words, if the air speed were reduced too much, why, the airplane would begin to mush or settle before it stalled.

Q. But the result as to an obstacle would be what?

A. That is not quite clear with me. [87]

Q. Well, you are coming in on your approach, and you have this obstacle in front of you and above you, and you attempt to clear it, and you attempt emergency procedure but fail to raise your flaps and the mushing resulted, what would be the reaction of the plane to the obstacle?

(Deposition of Bernard John Oswald.)

A. Well, if he failed to raise the flaps, you say?

Of course, I don't know what the result would be. It would depend on how fast he applied the power and how much he pulled the nose up, how much he felt he could get out of the airplane without stalling.

Q. This mushing factor you are talking about, is it not, sir, that the condition would be the plane would not climb but would continue in a near-stalled position without a climb and without changing altitude?

A. If he didn't apply enough power, but the tri-pacer will climb with full flaps.

Q. Within its normal climb for which it was designed?

A. No. The best configuration for getting out of a tight spot with a tri-pacer is with half flaps.

Mr. Obenour: I believe that is all.

Recross-Examination

By Mr. Reynolds:

Q. But if the flaps were left down, full power were immediately applied and the nose pulled up, it is [88] possible for the aircraft to clear an obstruction in its path, this particular aircraft?

A. Yes.

Mr. Reynolds: That is all.

Redirect Examination

By Mr. Obenour:

Q. The last question would depend, would it not, on the height of the obstruction above the flight of the path of the aircraft?

(Deposition of Bernard John Oswald.)

A. That is right, although, they were in the first phase how much rate of climb they had left.

Q. And the position of the approach as well.

In other words, the degree of change from the approach altitude of the plane to the climb altitude?

A. Yes. There are many variable factors there.

Mr. Obenour: I believe that is all.

Mr. Reynolds: That is all I have.

(Witness excused.)

(Pursuant to stipulation the signature of the witness to his deposition was waived.) [89]

Certificate

State of Washington

County of Pierce—ss.

I Gerald J. Popelka, a notary public duly commissioned and qualified in and for the County of Pierce, State of Washington, do hereby certify that pursuant to subpoena there came before me on the 30th day of September, 1959, at the hour of 10:00 o'clock a.m. Bernard John Oswald who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 30th day of September, 1959.

[Seal] /s/ GERALD J. POPELKA.

EXHIBIT A ATTACHED
(Pages 141 to 146)

[Endorsed]: Oct. 5, 1959.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON

School Graduation Certificate

This is to certify that GLENN AMBROSE PRICE (Name) was graduated from the

BURTON, WASHINGTON (Address) PRIVATE PILOT curriculum of the

OSWALD FLYING SERVICE (School)

CENTER & FILDRED, TACOMA, 66 WASHINGTON (Address) Air Agency Certificate No. 7337

on JULY 28, 1955 (Date); that he has successfully completed the instruction required

by the Civil Air Regulations and is eligible to apply for a PRIVATE PILOT

Certificate and A. S. E. L. Rating as issued by the Administrator of Civil Aeronautics.

The record of this graduate is as follows:

Flying time:

Dual 43:35

Solo 33:40

Total 77:15

Final flying grade 82%

COURSES SATISFACTORILY COMPLETED

PRIVATE PILOT WRITTEN EXAM

GRADE 100%

I certify that the above statements are true.

OSWALD FLYING SERVICE

(School)

By

(Signature)

CHIEF PILOT

(Title)

Date issued July 28, 1955

Date	Airplane Number	Duel	Solo	Instructor's Initials	Pre-Flight	Taxiing	Climbs & Glides	Turns	Stalls	S-Turns	Pattern & Track	TO & Ldg's	X-Wind Ldg's	Turns Ar' Point	Emergencies	Slow Flight	Spirals	8's on Pylon	Chandelles	Lazy 8's	Slips	Radio	Coordination	Average Grade	NAME	Course
2-22/55	1229E	4:5		GO	3	1																		4	G. A. Price	Glen Price
2/18	85069	:50		GO	3	2																		4	G. A. Price	Priv
3/20	85069	:35		GO	3	3	4																	4	G. A. Price	
3/22	3971V	:50		GO	3	4	3																	3	G. A. Price	
3/26	1339E	:50		GO	2	3	4	3																3	G. A. Price	
3/27	3971V	4:50		GO	2	X	4																	3	G. A. Price	
3/29	1339E	:50		GO	2	3	3	1	3															3	G. A. Price	
4/1/55	1229E	1:10		GO	2	3	4	4																3	G. A. Price	
4/2	84160	1:00		GO	2	3	4	3																3	G. A. Price	
4/3	84160	:50		GO	2	3	4	4																4	G. A. Price	
4/5	84160	:50		GO	2	4	4	4	4															4	G. A. Price	
4/18	84160	:50		GO	4	4	4	4	4															4	G. A. Price	
4/19	84160	:55		GO	4	4	4	4	4															4	G. A. Price	
4/27	84160	1:00		GO	3	3	4	4																4	G. A. Price	
4/27	8711V	40		GO	2	4	4	4	4															4	G. A. Price	
4/29	84160	1:35		GO	2	4	4	4	4															4	G. A. Price	
5/1	1229E	1:00		GO	3	4	4	4																4	G. A. Price	
5/2	1229E	1:05		GO	3	3	4	4																4	G. A. Price	
5/3	1229E	:55		GO	3	3	4	4																4	G. A. Price	
5/8	1229E	1:00		GO	3	3	X	4	4															4	G. A. Price	
5/13	1229E	:55	10	GO	3	3	4	4																4	G. A. Price	
5/14	1229E	:55	15	GO	3	3	4	4																4	G. A. Price	
5/30	1229E	:10	40	GO	3	3	4	4																4	G. A. Price	
5/22	85069	:25	35	GO	3	3	4	4																4	G. A. Price	
5/23	3971V	1:05		GO	3	3	4	4																4	G. A. Price	
5/23	1229E	:10	50	GO	3	3	4	4																4	G. A. Price	
5/24	85069	:25	110	GO	3	3	4	4																4	G. A. Price	
5/25	1229E	:20	120	GO	3	3	4	4																4	G. A. Price	
5/27	1229E	:45	15	GO	3	3	4	4																4	G. A. Price	
5/27	1229E	:15		GO	3	3	4	4																4	G. A. Price	
6/1	1229E	:55		GO	3	3	4	4																4	G. A. Price	
6/2	1229E	:25		GO	3	3	4	4																4	G. A. Price	
6/3	85069	:105		GO	3	3	4	4																4	G. A. Price	

REMARKS

Date	Airplane Number	Dual	Solo	Instructor's Initials	Pre-Flight	Taxiing	Climbs & Glides	Turns	Stalls	S-Turns	Pattern & Track	TO & Ldg's	X-Wind Ldg's	Turns Ar' Point	Emergencies	Slow Flight	Spirals	8's on Pylon	Chandelles	Lazy 8's	Slips	Radio	Coordination	Average Grade	NAME	COURSE		
6/5/55	1229E	2:00	20	BH	33	34	Shank Field																		B. A. Price	Glenn Price		
6/6/55	"	1:00	1:25	BH	3		Spins - denigrate acrobatic																		B. A. Price	Price		
6/7	"		1:05	BH	1		Turns - denigrate acrobatic																		B. A. Price			
6-10-55	76684	5:30		CB			DUAL KC SALT LAKE CITY - RADIO PROCEDURES & TEAM EXERCISING																		B. A. Price			
6-12-55	1229E		1:40	BH			Olympia - Shuttle - denigrate																			B. A. Price		
6-13-55	"	:55	1:45	BH			Stalls - denigrate acrobatic																			B. A. Price		
6-15-55	"		1:55	CB			SOLD KC TACOMA - BREMERDIA - SNOHOMISH - TACOMA																			B. A. Price		
6-16-55	"		1:30	CB			444																				B. A. Price	
6-17-55	"		2:20	BH			SOLD KC Tacoma - denigrate acrobatic																				B. A. Price	
6-28	"		1:30	CB			" KC Chisholm - denigrate																				B. A. Price	
6-25-55	76684	2:30		BH			X C Tacoma - Ellensburg - denigrate																				B. A. Price	
7-5-55	1229E		1:20	BH			practice flying compass heading																				B. A. Price	
7-7-55	"		5:05	BH			Prima Portland - denigrate																				B. A. Price	
7-12-55	"		1:00	BH			7200 - denigrate																				B. A. Price	
7-13-55	"	1:00		BH			Simulated high altitude - denigrate																				B. A. Price	
7-13-55	"	1:10	1:30	BH			Stalls - 7200 - denigrate																				B. A. Price	
7-14-55	"		1:40	BH			7200 - denigrate																				B. A. Price	
7-22-55	"	1:20		BH			Turns - denigrate																				B. A. Price	
7-24-55	"		1:35	BH			" " " " " "																				B. A. Price	
7-25	1160	1:00		BH	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	33	B. A. Price	
7-25	1229E	:20	30	BH	32	3																					B. A. Price	
7-28-55	"	1:50		BH			Private Sequence																				B. A. Price	
7-28-55	34160		1:30	BH			Top Landing																				B. A. Price	
8-1	1229E		1:40	BH			Top Landing																				B. A. Price	
8-10	1229E		1:20	BH			" " " " " "																				B. A. Price	

REMARKS

In the United States District Court
For the District of Arizona

(Consolidated)

Civ.—2962—Phx.

Civ.—2963—Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

GLEN A. PRICE and JANE DOE PRICE, husband
and wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION UPON ORAL EXAMINATION OF
DR. FORREST L. FLASHMAN

Be It Remembered, That the deposition upon oral examination of Dr. Forrest L. Flashman was taken at the instance of the Plaintiffs herein in the above-entitled and numbered Causes on the 22nd day of September, 1959, at the hour of 11:00 a.m., at the office of Dr. Forrest L. Flashman, 1120 Cherry Street, Seattle, Washington, before Eugene E. Barker, Official Court Reporter and a Notary Public in and for the State of Washington, residing at Tacoma. [1]*

*Page number appearing at bottom of Original Deposition.

(Deposition of Dr. Forrest L. Flashman.)

Appearances: The Plaintiffs herein being represented by Robert M. Reynolds, of the firm of Metzger, Blair & Gardner;

The Defendant herein being represented by John S. Obenour, Jr., Assistant District Attorney.

Whereupon, the following proceedings were had and done, and testimony taken, to-wit: [2]

Mr. Reynolds: Let the record show that this deposition is being taken pursuant to the usual stipulations, waiver of time and place, waiver of all objections until the time of trial.

Is that all right, Mr. Obenour?

Mr. Obenour: Yes.

Whereupon, Dr. Forrest L. Flashman, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Reynolds:

Q. Will you state your name, sir?

A. Forrest L. Flashman.

Q. And your residence?

A. 3939 Surber Drive, Seattle.

Q. And you are a physician? A. Yes.

Q. Any particular specialty?

A. The specialty of orthopedic surgery.

Q. Will you summarize for us briefly your training and experience as an orthopedic physician?

A. I am a graduate of the Northwestern University Medical [3] School, 1941. I interned the following year at Swedish Hospital in Seattle, '41 to '42. The

(Deposition of Dr. Forrest L. Flashman.)

next year I went at Children's Hospital in Denver as an orthopedic resident in preparation for the practice of orthopedic surgery, postgraduate training. The following three years, 1943 to 1946, I spent as a fellow at Mayo Clinic in orthopedic surgery. The next two years, to '48, I stayed with the staff of the Mayo Clinic and did orthopedic surgery for them, and came to Seattle in 1948, and have been in practice here since that time.

Q. Do you know Mr. William Cunningham?

A. Yes, I do.

Q. When did you first meet him?

A. I first saw Mr. Cunningham on October 25th of 1956.

Q. Was that as a patient? A. Yes.

Q. Will you describe his condition at that time and the circumstances under which he was referred to you?

A. At that time that I saw him he gave a history of having been in an airplane accident just a few weeks previously. He had sustained injuries to his back, and at the time I saw him he was in a body cast and had some sutures in his face. I removed some stitches from his left eyebrow from a wound he had there, and subsequently had him fitted with a hyper-extension type of back brace and [4] removed his back cast.

Q. What was the extent of that cast?

A. That cast that he had on at the time I saw him was designed to bend his back backward, and ex-

(Deposition of Dr. Forrest L. Flashman.)

tended from high on the chest to the groin in front, and it was somewhat narrower in back.

Q. Well, did that cast go all the way around his body?

A. It went all around his body.

Q. What was your diagnosis initially?

A. That he had had a compression fracture of the lumbar spine, in the mid-portion of the low back area about the belt line level.

Q. Can you describe that injury a little more fully, sir?

A. Well, this is a compression fracture. It is so termed to describe a vertebral body, which is usually a square block of bone, having been mashed together in one portion of it, and like most compression fractures that are sustained in acute flexion or bending forward position, the front part of the body of this vertebra was smashed down.

Q. Were any X-rays taken at that time?

A. Yes, they were.

Q. Were they taken by you?

A. Yes, they were.

Q. Did you take X-rays at that initial visit? [5]

A. Yes, I did. We took X-rays through the cast of his low back area.

Q. How many?

A. There are two views, which include one from the front and one from the side.

Q. Are there any numbers which identify those two views so that they can be distinguished from any others?

(Deposition of Dr. Forrest L. Flashman.)

A. The X-ray films which were made at that time have the patient's name, the date which they were made.

Q. That would be October 25, '56?

A. That is right.

Q. And those X-rays show the condition of the vertebrae at the time he was sent to you; is that correct?

A. That is correct. And these X-rays show a compression fracture of the body of one of the upper lumbar vertebra, and the body is compressed about 25 per cent in the anterior position.

Mr. Reynolds: I should like to include these as exhibits with the deposition, Jack.

The Witness: Do you want to number them or anything?

Mr. Reynolds: Yes, I think we had better.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 1.) [6]

Q. And let the record show that the X-ray numbered one is what, sir?

A. X-ray numbered one is an X-ray that was made of Mr. Cunningham's back in my office on October 25, 1956. It is a picture of his lower back taken in a front-to-back position, or it is called an anterior view of the lumbar spine.

Q. And the X-ray you are now marking Number 2?

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 2.)

A. X-ray marked Number 2 is an X-ray made in my

(Deposition of Dr. Forrest L. Flashman.)

office under my direction of Mr. Cunningham's back on October 25, 1956. This picture was made from the side. It is called a lateral view of the lumbar spine.

Q. Now, at that first visit, did you prescribe any treatment for this condition?

A. Yes, I did. At this visit I decided that the cast which he had on could be removed and he could be put into a hyperextension back brace, wouldn't be quite as bulky but which would keep his back in this hyperextended position for protection and healing of his fracture.

Q. Did he get that brace?

A. Yes, he did. [7]

Q. Do you know the place where he got it?

A. I believe it was Swiech's Brace Shop.

Q. The bill I have, Dr. Flashman, is from Charles C. Cullen. A. Cullen.

Q. And do you happen to know the cost of that brace? A. Not exactly.

Q. All right. When did he obtain that brace? Do you know that?

A. He was sent to Cullen's Brace Shop on the same day that I saw him, and was checked in my office the following day with his brace on, which would be October 26th of 1956.

Q. What was the purpose of the brace and the cast, Doctor?

A. The brace and the cast were used to maintain a position of hyperextension in his back which would keep the spine in an erect position, and is the reverse

(Deposition of Dr. Forrest L. Flashman.)

of the position in which he sustained his injury. In other words, his injury was sustained by having his back acutely flexed or buckled forward, and in order to treat this condition we bend the back backward and hold it there until the fracture heals.

Q. Would you say that his condition at the time you saw him was normal for a person who had had a compression fracture of the back?

A. Well, his condition was the usual of that of a patient [8] that has had a compression fracture of the back.

Q. Was he able to move around?

A. Yes, he was ambulatory. He could move around. He was living at home, traveling back and forth from his home to my office.

Q. Were there any limits on the activities of which he should engage in at that time?

A. Yes, there were quite a few limitations, in that he was to do no type of heavy lifting or subject his back to any type of strain, and he was to keep the hyperextension brace on his back night and day. At no time was he to take it off and bend forward.

Q. Do I understand you correctly to say that he couldn't bend over with either the brace or the cast on?

A. That is correct. If he bent at all, he would bend from the hips. In other words, in order to approach his shoe level he would have to bend from the hip joint, and he could not bend his back with the bracing apparatus we had on him.

(Deposition of Dr. Forrest L. Flashman.)

Q. Nor could he do any heavy lifting?

A. No.

Q. How long did he have to wear that brace?

A. I saw him at frequent intervals following the initial visit.

Q. Can you give us a rundown on the dates, sir?
[9]

A. I saw him in October of 1956, and in November of 1956, and in December of 1956, and note that on January 2nd of 1957, that the X-rays of his back at this time showed no further compression; that the fractures seemed to be healing solidly, and I advised him that at this time he could leave his back support off at night.

Q. Now, I note that subsequent X-rays were taken; when were the next X-rays, after the two that we have already put in evidence?

A. A single view of his spine was made from the lateral side about three or four days after I had first seen him to check position while he was in a new brace. He was X-rayed again in November, and then again in January of 1957.

Q. What was the purpose of the November X-rays?

A. Those were to check the position of the vertebral body fractured, and its healing.

Q. And the next X-rays after that were taken in January?

A. On February 12th of 1957.

Q. Were those the X-rays which formed the basis for your advice that he could take the brace off at night?

(Deposition of Dr. Forrest L. Flashman.)

A. Excuse me. The X-rays were made on January 2nd of 1957, and six weeks later, on February 12th of 1957—

Q. What was the purpose of those, the two—

A. To check the healing of his vertebral body fracture. [10]

Q. The set that was taken on January 2nd, I think you said—

A. Yes.

Q. Were those the basis for your advice to Mr. Cunningham that he could remove that brace at night?

A. Yes.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 3.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 4.)

Q. Now, will you explain those and how you have marked them?

A. The X-ray that is marked Number 3 is an X-ray of Mr. Cunningham's back that was made in my office on January 2nd, 1957. It is an X-ray of the lumbar spine made in the anterior-posterior direction. And the X-ray marked Number 4 is an X-ray made on the same date, January 2nd of 1957, of Mr. Cunningham's back in my office, which is a lateral view of the lumbar spine, and it shows the deformity of the body of the upper lumbar vertebra. It also shows that there has been no further compression of the body and it appears to be healing well.

Q. Now, the next set of X-rays were taken in February?

A. Yes, sir. Do you want these, too? [11]

(Deposition of Dr. Forrest L. Flashman.)

Q. Yes, I think we had better have them.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 5.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 6.)

A. X-rays marked Numbers 5 and 6 are X-ray films made of Mr. Cunningham's back February 12, 1957, in my office. Number 5 is a film of the lumbar spine in the anterior-posterior direction. Number 6 is a film of the spine in the lateral position.

Q. Now, was this the next time after the 2nd of January that you saw him?

A. Yes.

Q. And did you make any prescription at that time?

A. At this time I felt that the X-rays of the spine showed that his fracture was unchanged; in other words, there was no increase in the deformity. I felt that his fracture was healed enough for ordinary use, and advised him that he could leave his back brace off intermittently now and to wear it only if he were going to subject the back to any type of strain.

Q. That was on February 12, 1957? [12]

A. February 12, 1957.

Q. And when did you next see him?

A. I next saw him on September 11th of 1957.

Q. What was his condition at that time?

A. At this time he stated he was getting along fairly well except that he had a back that would not let him do any heavy lifting, and he noticed aching and fatiguing through his low back area by evening, and on examination on this date there was no par-

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ticular tenderness to either palpation or percussion. His back motion was moderately limited; in other words, he could bend over so he would come within about fourteen inches of touching the floor with his fingers, with the fingers and knees extended. Lateral bending, to the right and left, was limited about 50 per cent, and he had not up to this time been advised that he could push back bending to any degree.

Q. Did you give him any treatment at that time?

A. No, I did not.

Q. Did you take any X-rays at that time?

A. No.

Q. What was your advice to him at that time, or did you give him any?

A. Well, at this time I told him I thought his back was healed enough so that he should be able to go about his business as long as he avoided extra heavy stress and [13] strain.

Q. And when was the next time you saw him?

A. The next time I saw him was August 19th of 1959. [14]

Q. And what was his condition at that time?

A. At this time he was getting along fairly well. He stated that any time that he did any heavy type of work that he would have a little trouble with his back, with aching pain and fatiguing, and the soreness or pain in his back that he was complaining of was just a little lower in the lumbar spine than the area of his fracture. This is not too unusual as the majority of people that have compression fractures of the lumbar spine usually have a little residual difficulty with the low back about the junction of the lumbar spine and the

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pelvis, and Mr. Cunningham's occupation is that of a tavern owner, but he has found that he can't lift the heavy kegs in position to tap them, and he does hire help to do this for him. On a few occasions when he has had to tap a keg on his own he has had trouble with his back.

Q. Could you find any physical evidence of this trouble?

A. No. At this time it was noted that he had a fairly good range of motion in his back. He seemed to be well muscled. There was no back muscle spasm and there was no tenderness over the area of his fracture in the upper lumbar spine. There was a little pressure over the [14] intraspinous ligaments at the lumbo-sacral area, or at the junction of the lumbar spine and pelvis. His lower extremity motion tests and reflexes were all essentially negative.

Q. Did you take any X-rays at that time?

A. Yes, I think I did.

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 7.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 8.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 9.)

(Whereupon, an X-ray was marked for identification as Deposition Exhibit Number 10.)

A. The X-rays that were made on August 19, 1959, of Mr. Cunningham's back have been numbered 7, 8, 9 and 10. These are X-ray films made of the lumbar spine from various angles. The Exhibit marked Number 7 is a film made of the lumbar spine from the

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anterior-posterior direction. The films marked 8 and 9 are both lateral [15] views of the lumbar spine. Film Number 8 shows a little more the lower lumbar spine, and film Number 9 shows a little more of the upper lumbar spine, and they both show residual deformity of the body of the upper lumbar vertebra that was compressed, with possibly 25 or 30 per cent narrowing of the anterior margin, and they also show what we term hypertrophic or osteoarthritic over growth of the superior margin of the fourth lumbar vertebra, which spur was noted on the original films made of October, 1956, and which possibly is a little larger now than it was at that time. The film labeled Number 10 is a film of the lower lumbar spine, chiefly what we term the lumbosacral joint, which is about the area that he seemed to be having his low back trouble or discomfort at this time, and he reveals an essentially normal appearing lumbosacral joint, with a tendency toward a moderately increased sacral carrying angle. In other words, we ordinarily think of the back bone as being made of one block of bones setting on top of the other, and they set in a more or less upright position on the pelvis. Some people have a pelvis which has a somewhat backward curve to it; in other words, these type of people present more of a bustle than a person with an entirely upright spine, so that there is a little more shearing force where the weight of the body and the [16] spinal column sets on the pelvis.

Q. Is this the case with Mr. Cunningham?

A. He has a moderate tendency toward this type of carrying angle.

(Deposition of Dr. Forrest L. Flashman.)

Q. Is this traceable in any way to the compression fracture? A. I don't believe so.

A. And what is your prognosis for Mr. Cunningham?

A. Well, I think Mr. Cunningham will be able to continue to carry on as he has, that is, make a living and remain fairly happy with his back as long as he doesn't have any real heavy work to do with it.

Q. In your opinion, is he disabled from doing heavy work with it?

A. He is probably not disabled from doing real heavy work, although I am sure that if he did anything very heavy with it he would have to pay for it in pain and suffering over a period of the next few days or a week until he had relieved this back soreness that he would have. In other words, this is a back that just won't quite mechanically take all the stress and strain that occurred prior to his injury.

Q. In your opinion, is this condition traceable to the compression fracture as a result of this airplane accident?

A. This condition is traceable to the result sustained in [17] his airplane accident.

Q. In your opinion, will he be personally disabled?

A. Yes, I think so.

Q. Doctor, you mentioned the fact that there were some arthritic spurs on the vertebrae involved in this accident; did you—First of all, did you mention that?

A. I mentioned the fact that there was an arthritic spur, a fairly large one, on the body of the fourth lumbar vertebra, which had been present at the time the

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original films were made, but which now seemed to have increased a little in size.

Q. Now, what would this signify?

A. This may or may not signify anything, in that we expect a slow and natural increase in these hypertrophic changes. They are part of an aging process of a back.

Q. Would this have anything to do with the fracture in the aircraft accident?

A. I don't know.

Q. You could express no opinion on that, then?

A. I think I can, but it would have to be more of a generality. We feel that people that have degenerative changes in their spine, that develop these hypertrophic arthritic or wear-and-tear type of changes, have joints and bone structure that don't stand stress or strain quite as well as a back that doesn't have it, and whether or not an [18] injury per se can produce these would depend a little on the injury. We can definitely trace some of our hypertrophic degenerative changes and this bony spurring to single injuries. In Mr. Cunningham's case, this was present at the time that he had his injury and the injury may have produced a condition which would make this a little more symptomatically noticeable to the patient. In other words, people that do have arthritic changes or arthritic spurring in their back will often have a back made symptomatic by injury; in other words, often a severe injury may make a back that has degenerative changes and hypertrophic arthritic changes symptomatic that would probably not be symptomatic otherwise. In other words, we think that there

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is a little stiffening or limitation of motion in this type of back, and when motion is forced beyond that limit then the back hurts, and a chronic strain condition can persist as a result of that.

Q. Are you able to say whether this is the case with Mr. Cunningham or not, independently of any statements he may have made to you?

A. I have a feeling that Mr. Cunningham's residual condition now is a direct result of the severe injury that he had to his back. As far as trying to tie up this one hypertrophic spur that we see, I think it is immaterial. He [19] still is suffering from a chronic strain condition of low back brought on by his injury.

Q. I see. Now, are there any other arthritic changes evident in these X-rays?

A. No, not to any extent.

Q. I see. Do you know how old Mr. Cunningham is?

A. He was forty-nine when I first saw him in 1956.

Q. I see. Can you tell me how much you charged Mr. Cunningham for these various visits and treatments?

A. Mr. Cunningham's bill is \$278.00. You may have that.

(Whereupon, a medical statement was marked for identification as Deposition Exhibit Number 11.)

Mr. Reynolds: Let the record show that a summary of Dr. Flashman's charges is marked 11 in the upper left-hand corner in pencil, and will be attached to this deposition as an exhibit.

(Deposition of Dr. Forrest L. Flashman.)

Q. Have you been paid these fees, sir?

A. No; I think there has been part payment paid on them.

Q. Just to review one thing a little bit; on the 26th of October, 1956, when you first saw Mr. Cunningham, he was in a cast which you changed for a brace; is that right? A. Yes.

Q. You advised him that he could dispense with the brace [20] in the daytime on the 2nd of January of 1957?

A. Yes—Correction; at nighttime.

Q. He could dispense with it at night, but had to keep it on in the daytime? A. That is right.

Q. And did you ever advise him when he could stop using the brace?

A. Yes; on February 12th of 1957, I advised him that he could start to leave his brace off during the daytime providing that he would wear it if there were going to be any back strain involved in anything he was doing.

Q. Now, when was he able to dispense with the brace entirely? A. I don't know.

Q. That would be up to him, then?

A. I advised him I would like to check him again in about two months, and the next time I saw him was in August.

Q. September 11th, I believe, was the date you gave, sir.

A. Is that right? In September of 1957.

Q. Now, with regard to the injuries, other than those to Mr. Cunningham's back, I believe you stated

(Deposition of Dr. Forrest L. Flashman.)

that they consisted of lacerations which were at that time sutured when you first saw him; is that right?

A. Yes.

Q. Could you describe those in a little bit more detail for us? [21]

A. The laceration that I treated was a laceration over the left eyebrow area, which had been sutured at the time of his accident, and from which I removed the sutures as it healed.

Q. What was the condition of that laceration at the time you saw it?

A. It was a healing laceration. It was clean and doing satisfactorily.

Q. Did you give any further treatment for that laceration or any other injuries that he had had?

A. No, I did not.

Q. That was the end of those?

A. Right. He had multiple contusions and bruises about his body and some areas of discoloration around his face and shoulders, but these areas required no treatment.

Mr. Reynolds: I believe you can question, Jack.
By Mr. Obenour:

Q. Your first contact with Mr. Cunningham was in effect a referral from the original work that was done at the time of the accident to a local doctor?

A. Yes. [22]

Q. And as a result of your X-rays at that occasion, marked X-rays 1 and 2, you made your diagnosis of this compression fracture; is that right, sir?

A. Yes.

(Deposition of Dr. Forrest L. Flashman.)

Q. On that occasion you noticed this arthritic spur on the fourth vertebra, and is that arthritic spur of the fourth vertebra above the point of compression, the compression fracture?

A. No; it is below, or, in other words, it is distal or toward the leg side of the fracture.

Q. And how far would it be from the point of the fracture to this fourth vertebra, or where the spur was?

A. Oh, in inches, possibly three to four.

Q. Three to four inches below the—

A. That is right.

Q. And then you saw him in November, December, and then in January, and that was to determine that the healing process was proceeding properly, I take it; is that right, sir? A. Yes.

Q. Now, during this time he was ambulatory, between October and February, he was ambulatory by means of this brace, and the limitations, then, according to your advice, was that there would be no lifting and no straining and not to bend forward? [23]

A. Correct.

Q. Then the healing had progressed sufficiently by February 12th where he could leave off the brace and wear it only when he was going to strain himself by lifting; is that correct, sir?

A. That is essentially correct. He was told he could start to discard his brace during the daytime.

Q. Was he working during this period of time?

A. I don't know just how much work he was doing. As I say, he operates a tavern, and he was spending time in the tavern as an owner and part operator, but he was hiring his work done.

(Deposition of Dr. Forrest L. Flashman.)

Q. And the X-ray taken in February, did that show that the fracture had healed then, the healing process was completed or not?

A. I don't believe that an X-ray will tell you whether or not a healing process is completed in four and a half or five months. Part of that is the judgment on the part of the doctor taking care of him as to how far he thinks bone healing has gone, and the X-ray merely outlines or is a shadow of the vertebral body which is fractured, and the fracture had remained stable; in other words, there had been no further compression during any of the healing time, so it was felt that it was probably solidified enough so that it could take a moderate amount [24] of movement without protection above a back brace.

Q. Would that be your opinion, that the healing had been completed by February?

A. No, I don't think it was completed by that time; I think it takes a good six months for a compression fracture to become healed well enough so that it can take a good deal of jarring and pushing around, again in a person of this age.

Q. And that would have been in March?

A. Possibly six weeks more, right.

Q. And on that basis you told him to come back in two months?

A. In about two months.

Q. But he did not come back, then, until seven months later?

A. That is correct.

Q. Now, your determination, then, is based upon an opinion of the healing from the comparative X-rays, if I may use that term; in other words, comparing one

(Deposition of Dr. Forrest L. Flashman.)

to another to see whether there has been any change, and then the age of the particular patient; is that right?

A. That is correct.

Q. To what degree is your determination based upon the statements of the patient?

A. Not to any extent in which the patient could sway my judgment so that I would pronounce him healed in two months rather than in six, and we don't expect a patient [25] with a compression fracture to have any real severe pain in the back or the area of their compression after a certain length of time after an accident. In other words, these fractures can be healing for a period of three or four months and not be causing any particular pain, particularly when the fractures are being protected by a form of partial immobilization.

Q. Well, you referred to tenderness and limitations of movement, which I assume you determined from physically viewing him and causing him to attempt to move and so forth at the time of his visit; is that right?

A. Only to a very limited extent. There is no attempt made to examine or determine a range of back motion while a fracture is healing, and I am always very careful to caution a patient not to attempt to bend the back, and particularly to flex it during that first six months' period after a compression fracture of a vertebral body.

Q. On the occasion of his visit in September, now, did he come to see you so that you could check his progress, or was there some other reason?

A. No; I think that his visit at that time was a further check on the status of his condition.

(Deposition of Dr. Forrest L. Flashman.)

Q. In other words, he simply had delayed an additional five months in coming back to have you examine the condition of his back? [26]

A. Yes.

Q. So, in that time his back had not bothered him sufficiently to cause him to come to see you as you originally directed him to?

A. I would not expect his back to bother him if he were to follow directions in avoiding back stresses and strains. At the time I saw him in September, he was still having trouble with his back, but nothing severe enough that had him frightened.

Q. The only time that he would have noticed any limitation on his activities would be the lifting of the full kegs and tapping the kegs at the tavern; is that right?

A. At this time I didn't ask him specifically about his kegs. He just made the statement he was unable to do any type of heavy lifting without his back hurting him, and also that his back still was sore and fatigued at the end of the day after being up and around all day.

Q. Then at this time, though, his complaint was at an area lower than the compression, rather than the area of the compression itself?

A. Well, at this time, in September of '57, it still seemed to be pretty much the whole lumbar spine, at least from the level of his fracture down to the lumbo-sacral joint, but there were no areas that were specifically tender to percussion. I could rap fairly firmly over the [27] fractured vertebra and he did not have pain. He had tenderness in the soft tissues and tender-

(Deposition of Dr. Forrest L. Flashman.)

ness in the intraspinous ligaments, but there was no longer any pain that one could produce by jarring this back.

Q. Maybe I misunderstood you. Did you make some reference to a complaint at the lower region rather than from the region of the compression fracture?

A. Yes; and that was made at the time of my examination in August of 1959.

Q. August of '59? A. Yes.

Q. And you say that this is a result of the compression fracture, this excessive tiredness or fatiguing at the lower back extremity, or—

A. That he had in September of 1957?

Q. Yes.

A. Yes.

Q. Well, this fatiguing at the—

A. His complaint that he has now of soreness, aching, and symptoms in the low back which he tends to localize at the lumbo-sacral level, which is the lower portion of our spine, is what I think are residuals of a rather severe back injury. The compression fracture was evidenced by X-ray of such injury, although in order to get a fracture like that the whole spine has to be put [28] under rather severe strain and, as is typical with most of these lumbar compression fractures the residuals of soreness and aching are usually at the lumbo-sacral junction after the original fractured vertebra has healed. The residual stress or strain symptoms continue to exist as a chronic strain type of thing.

Q. And this was reported to you in August of '59, rather than in September of '57?

(Deposition of Dr. Forrest L. Flashman.)

A. In September of '57, the whole, or at least two-thirds of the lumbar spine from the level of his fracture down was still sore, tender and with generalized aching and fatiguing. Several years later, in August of 1959, he no longer had complaints at the level of his fracture, which was the upper lumbar spine, but his complaints now seemed to be fairly well localized to the lower portion of the lumbar spine.

Q. The only way you can tell it, however, is by his reporting this condition to you; is that correct, sir?

A. It is not visible to X-ray. Yes, to a large extent.

Q. And you mentioned, I believe, symptomatic conditions that result from a back injury. Is that in effect that a person who has had such an injury is more conscious to feeling aches or fatiguing in the back because he has suffered the injury?

A. Yes, I think so. [29]

Q. And, in other words, this condition is induced, or rather claimed by the patient to exist more so from one who has had the injury, or is it something that simply any one of us who are not used to doing heavy work or lifting a keg would feel the next day but wouldn't attribute it to a back injury? Do I make myself clear?

A. Yes, I think you do, and I think you are probably correct in some of your statements, that particularly at Mr. Cunningham's age, and anyone that is over fifty or so that isn't doing heavy work, can produce backache by doing heavy work; on the other hand, people who have had severe back injuries with compression fractures, people who have had severe back injuries with

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compression fractures through the lumbar spine area, almost all have difficulty with residual complaints, which I think are chronic strain patterns from a severe injury. In other words, they have had a real severe strain or sprain through a back, or along with the X-ray a compression fracture, and the majority of my patients who have had these types of fractures continue to have difficulty with their low back.

Q. Well then, is it not a condition—not only Mr. Cunningham—but a condition that would be prevalent to an injury, or that a person would be much more conscious of any unusual pain responses from that area and that [30] they would attribute to the injury, or, in other words, they are much more conscious of it?

A. Yes; that is particularly true of the more severe injuries.

Q. When there may or may not actually be a reaction that would have resulted without the injury, as the former example of doing an undue amount of straining when you are not used to it?

A. I think that is entirely possible.

Q. So that, as far as you are able to say, the condition reported to you, well, you know what Mr Cunningham tells you his present condition is; is that right, sir?

A. That is correct.

Q. And that condition may be no different than it would have been without the injury for a man of his age doing this excessive lifting of a heavy keg, as he is doing in his work?

A. That could be.

Q. And the arthritic spur was not effected in this accident, in any event, in your opinion; is that right, sir?

(Deposition of Dr. Forrest L. Flashman.)

A. In September of '57, the whole, or at least two-thirds of the lumbar spine from the level of his fracture down was still sore, tender and with generalized aching and fatiguing. Several years later, in August of 1959, he no longer had complaints at the level of his fracture, which was the upper lumbar spine, but his complaints now seemed to be fairly well localized to the lower portion of the lumbar spine.

Q. The only way you can tell it, however, is by his reporting this condition to you; is that correct, sir?

A. It is not visible to X-ray. Yes, to a large extent.

Q. And you mentioned, I believe, symptomatic conditions that result from a back injury. Is that in effect that a person who has had such an injury is more conscious to feeling aches or fatiguing in the back because he has suffered the injury?

A. Yes, I think so. [29]

Q. And, in other words, this condition is induced, or rather claimed by the patient to exist more so from one who has had the injury, or is it something that simply any one of us who are not used to doing heavy work or lifting a keg would feel the next day but wouldn't attribute it to a back injury? Do I make myself clear?

A. Yes, I think you do, and I think you are probably correct in some of your statements, that particularly at Mr. Cunningham's age, and anyone that is over fifty or so that isn't doing heavy work, can produce backache by doing heavy work; on the other hand, people who have had severe back injuries with compression fractures, people who have had severe back injuries with

(Deposition of Dr. Forrest L. Flashman.)

compression fractures through the lumbar spine area, almost all have difficulty with residual complaints, which I think are chronic strain patterns from a severe injury. In other words, they have had a real severe strain or sprain through a back, or along with the X-ray a compression fracture, and the majority of my patients who have had these types of fractures continue to have difficulty with their low back.

Q. Well then, is it not a condition—not only Mr. Cunningham—but a condition that would be prevalent to an injury, or that a person would be much more conscious of any unusual pain responses from that area and that [30] they would attribute to the injury, or, in other words, they are much more conscious of it?

A. Yes; that is particularly true of the more severe injuries.

Q. When there may or may not actually be a reaction that would have resulted without the injury, as the former example of doing an undue amount of straining when you are not used to it?

A. I think that is entirely possible.

Q. So that, as far as you are able to say, the condition reported to you, well, you know what Mr Cunningham tells you his present condition is; is that right, sir?

A. That is correct.

Q. And that condition may be no different than it would have been without the injury for a man of his age doing this excessive lifting of a heavy keg, as he is doing in his work?

A. That could be.

Q. And the arthritic spur was not effected in this accident, in any event, in your opinion; is that right, sir?

(Deposition of Dr. Forrest L. Flashman.)

A. I don't believe it was effected by any X-ray evidence that I have been able to see, and the increase in size of it I think can be attributed in part to natural progression of that type of lesion.

Q. Would a back with this condition not also be subject to [31] increasing limitations on the use of that back by the arthritic condition?

A. Backs that have a tremendous amount of this arthritic or degenerative change probably can become symptomatic through daily use. I don't think that the condition that Mr. Cunningham has in his back, which is a very localized arthritic spur, has much bearing one way or the other, and this back is not an arthritic back per se.

Q. Is this an indication of a condition that will continue to get worse as time goes on, or is it apt to remain pretty much static?

A. This is fairly well localized. The spurring will probably gradually increase in size over a period of years. I don't think that it will become any more symptomatic particularly.

Q. You don't believe these symptoms he is experiencing are attributable to the spur at the present time?

A. No, I don't believe so.

Q. And the only limitation, to your knowledge, that could in any way be attributable at this time to the accident would be the extreme lifting which he reported assuming that this condition did result from the accident and not from a condition that we had previously discussed of a person who is much more apt to be conscious of this feeling, or assuming it is from the accident, the

(Deposition of Dr. Forrest L. Flashman.)

ultimate [32] effect that he has had on his back would be a limitation against extremely heavy lifting?

A. I think that is pretty much true. I think Mr. Cunningham has sustained what we could term permanent partial disability of this back as the result of his injury, so that he has a back which is mechanically not as able to take stress and strains as a normal back would be. I think in Mr. Cunningham's case that we could place a functional limitation from this type of injury to about 25 per cent limitation of this back now to perform functionally the way you would ordinarily expect it to at this age. In other words, this man has a back that he will not be able to subject to excessive stresses or strains, which not only include lifting a heavy keg in his type of work, but includes any type of other activity he might want to do, such as horseback riding, or a hunting trip, or carrying out a deer, or working around his yard, cutting and chopping wood and so forth.

Q. If he were to do so, it would result in fatigue?

A. Yes.

Q. Wouldn't this condition of fatigue result in any other fifty-year-old man doing a type of thing he wasn't used to?

A. I think it would to a certain extent. [33]

Mr. Obenour: I believe that is all.

Redirect Examination

By Mr. Reynolds:

Q. If Mr. Cunningham had not had this injury to his back, would the strains which Mr. Obenour was

(Deposition of Dr. Forrest L. Flashman.)

talking about affect him to as large an extent as they apparently do? A. I don't think so.

Q. Is that your opinion, Doctor? A. Yes.

Q. Doctor, I want to go into one thing which perhaps I forgot. Did you refer him to any other physicians or medical people, beyond the brace, for treatment of this particular injury?

A. I don't believe I referred him to any type of physiotherapy or any other supportive therapy.

Q. Now, Doctor, on cross-examination Mr. Obenour brought out the fact that Mr. Cunningham had delayed from February 12th, 1957, until September 11th, 1957, in seeing you; if he had seen you, would his condition be any better as a result of it?

A. No, I don't think so.

Mr. Reynolds: I don't think I have any more, Jack.
[34]

Recross-Examination

By Mr. Obenour:

Q. Was his examination here in August for the purpose of determining his present condition in regard to this suit, rather than from any other complaints he had?

A. Well, yes, the first time I saw him in August was for determination of his present condition. I saw him a week or so after that, at which time he came in with a very acute back pain. He was really in a lot of trouble. He had been watering his yard and bent over to pull out a root and had sustained a very severe catch of pain in his low back, with pain that radiated down into his left groin and left leg area. For this

(Deposition of Dr. Forrest L. Flashman.)

I gave him medication for relief of pain and spasm, and advised that he get physical therapy treatment, and he was followed here for several weeks. On September 8th of 1957, he broke out with a neuritic reaction which we call herpes, which is a very painful nerve inflammation, which followed the course of his pain from his low back around the groin, around the hip into the left groin, and this condition persisted for a week or two and now has gradually let up so that the only residuals of these herpes, or shingle blisters as we call them, are the brownish pock marks or scabs, somewhat similar to what you see following [35] chicken pox. So this man has had considerable difficulty since his August, 1959, examination. Just how much the strain of pulling this root out of the yard had to do with the subsequent onset of his very painful shingles, I can't tell you, but I am under the impression he has had two very severe attacks of back difficulty since the examination in August. He is still under treatment at present.

Q. With you? A. Yes.

Q. What is this herpes condition? A type of shingles, you say? A. Yes.

Q. What causes that?

A. We think it is a virus infection, and along the same type of thing that causes chicken pox and fever blisters.

Q. Not attributable to the aftereffects of the injury. then?

A. I don't believe so.

Mr. Obenour: I believe that is all.

Further Redirect Examination

By Mr. Reynolds:

Q. Now, Doctor, I understood you to say that herpes or [36] popularly known, I believe, as shingles; is that correct? A. Correct.

Q. Isn't it a fact that shingles usually affected the upper part of the abdomen up around the chest area?

A. I think they are probably a little more commonly seen on the upper chest area, although they will follow the course of any nerve, and we see them across the forehead, across the cheek, down a leg, down an arm, apparently wherever this inflammatory neuritic process has taken hold.

Q. Now, is it possible that the residual weakness of Mr. Cunningham's back, induced by the compression fracture, had something to do with this onset of shingles?

A. I don't believe so. I don't think that trauma per se is a logical factor in the production of shingles; and to answer the second part of your question as to whether or not a previous weakness may predispose to it, I don't know. I rather doubt it.

Q. Actually, not very much is known about shingles; would it be correct to say that, Doctor? It is something that the medical profession doesn't completely understand?

A. I think so. It just seems to pop up at the oddest times.

Mr. Reynolds: I believe that is all.

Mr. Obenour: That is all, Doctor.

(Witness excused.) [37]

Certificate

State of Washington, County of Pierce—ss.

I, Eugene E. Barker, Notary Public in and for the State of Washington, residing at Tacoma in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of Dr. Forrest L. Flashman, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting under my direction; said deposition upon oral examination being taken at Seattle, Washington, on September 22nd, 1959, being completed on said day;

I further certify that said witness and the parties hereto waived the reading and signing by said witness of his deposition after the same was fully transcribed;

I further certify that all objections made at the time of said examination, to my qualifications or to the manner of taking said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to [38] said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that said deposition upon oral examination, as above transcribed, is a full, true and cor-

rect transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am herewith securely sealing said deposition in an envelope, with the title of the above Causes thereon, and marked, "Deposition upon Oral Examination of Dr. Forrest L. Flashman," and promptly delivering the same to the Clerk of the aforementioned Court;

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 29th day of September, 1959.

[Seal]

/s/ EUGENE E. BARKER,

Notary Public in and for the State
of Washington, residing at Ta-
coma. [39]

In The United States District Court
For The District of Arizona

Civ.-2962-Phx.

Civ.-2963-Phx.

(Consolidated)

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

GLENN A. PRICE and JANE DOE PRICE, husband
and wife,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION UPON ORAL EXAMINATION
OF DR. R. E. RAMAKER

Be It Remembered, That the deposition upon oral examination of Dr. R. E. Ramaker was taken at the instance of the Plaintiffs herein in the above-entitled and numbered Causes on the 22nd day of September, 1959, at the hour of 9:15 a.m., at the office of Dr. R. E. Ramaker, Stimson Building, Seattle, Washington, before Eugene E. Barker, Official Court Reporter and a Notary Public in and for the State of Washington, residing at Tacoma. [1]*

*Page number appearing at bottom of Original Deposition.

Appearances: The Plaintiffs herein being represented by Robert M. Reynolds, of the firm of Metzger, Blair & Garner;

The Defendant herein being represented by John S. Obenour, Jr., Assistant District Attorney.

Whereupon, the following proceedings were had and done, and testimony taken, to-wit: [2]

Mr. Reynolds: Let the record show that this is taken pursuant to a continuance of a deposition which was originally started on August 7, 1959, and pursuant to the same stipulations as that deposition, of course.

Is that satisfactory with you?

Mr. Obenour: Yes.

Whereupon,

DR. R. E. RAMAKER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Reynolds:

Q. Doctor, I would like to go in for a moment, if I could, a little bit further concerning your qualifications as a dentist.

Mr. Obenour: For the record, we would stipulate as to his qualifications, and object to this as being repetitious.

Mr. Reynolds: Well, I just want to enlarge a little bit upon one item.

Q. You said you had done some work under a Guggenheim Foundation grant; is that correct? [3]

A. That is right.

(Deposition of Dr. R. E. Ramaker.)

Q. What kind of work was that, and about how long did it involve?

A. Well, they backed me up to a certain extent financially for seven years.

Q. Was this in connection with dental research of one kind or another? A. Yes, sir.

Q. Can you summarize very briefly what that research involved?

A. Well, it was an attempt to locate the primary cause of the majority of malformations of the mouth and nose of children. That is it.

Q. Now, Doctor, during your prior examination here we continued it for the reason that you wanted to re-examine Mr. Price; have you done so?

A. Yes, sir.

Q. Can you tell us if the distortion which you thought had probably occurred, according to your former testimony because of the fracture and the making of the new dentures, has occurred?

A. Yes, it has.

Q. What is his present condition, then, insofar as his dentures are concerned?

A. You mean as far as the dentures are concerned?
[4]

Q. Yes. Well, I mean as far as this overbite that you mentioned before is concerned.

A. Well, he has a diminution of the mandible, and a bite closure of not less than 8 millimeters in the forward positions of the mandible in its entirety.

Q. And this is due to the fracture?

A. The diminution of the mandible is due to the

(Deposition of Dr. R. E. Ramaker.)

fracture. The closure that he has had is due approximately 80 per cent to—I will have to change that a bit. Approximately 80 per cent of the closure is due to the accident, to the fracture; the other 20 per cent would be just normal closure.

Q. Which would occur in anyone?

A. Which could occur in anyone, yes, sir.

Q. Now, Doctor, what corrective treatment, if any would you advise for this condition?

A. There is only one treatment, and that would be to open the bite so that the jaws would not come together in their present position.

Q. And how would you advise that this be treated?

A. Well, if Mr. Price responds nicely to new dentures, it could all be handled just by the construction of one set of dentures and opening the bite.

Q. What would the cost of that be, approximately?

A. If we make just the one set of dentures for him, it would [5] be \$250.00; however, if that does not fully compensate, it might be necessary to again open the bite a little further, providing he could not tolerate the complete 8 millimeter opening at this time, and then that would be done by a conversion of these new dentures, then, into newer dentures, which would be \$100.00.

Q. In other words, that would be a \$350.00 total under the second alternative?

A. Yes; if it had to be done.

Q. Now, Doctor, have there been any other effects than simply a distortion of bite from this—

A. Yes; he is losing hearing.

(Deposition of Dr. R. E. Ramaker.)

Q. Is this likely to continue? A. Yes, sir.

Q. And this is caused by the closure of 8 millimeters which you mentioned? A. Yes, it is.

Q. Is a closure of 8 millimeters abnormal?

A. Very abnormal.

Q. Is there anything which can be done about the impairment of hearing?

A. To reclaim, no, sir, but to maintain where it is now the dentures would prevent any further loss of hearing.

Q. Is there any way that you can measure that loss of hearing? [6]

A. I have nothing to do that with, no, sir.

Mr. Reynolds: I believe that is all.

You may question, Mr. Obenour.

Cross-Examination

By Mr. Obenour:

Q. You say you have nothing to measure hearing with, Doctor? A. No.

Q. I didn't know he was losing his hearing. How do you know?

A. Well, I can tell you that. When I talked to the man, I kept my voice at a certain tone most of the time, then I would drop it a little bit, and he would say, "What did you say?" Then I would repeat the same thing, and he got it again. Now, another thing, Mr. Price is rather reluctant to admit that he is losing any hearing, but his wife, who was here with him the last time I examined him, insists that he is losing his hearing; that she has to talk to him a lot louder than she used to.

(Deposition of Dr. R. E. Ramaker.)

Q. Then your information as to his losing his hearing is really what his wife tells you, rather than—

A. Well, that part is true in part, yes, sir, except in my talking to him I tried to be reasonably fair about raising and lowering the voice. [7]

Q. Loss of hearing is also one of the conditions resulting from increased age, is it not?

A. Not necessarily.

Q. Is it not also one of the things that result along with losing your teeth and losing your eyesight, a diminution of hearing?

A. Yes, sir. I allowed 20 per cent of the loss of hearing to normal atrophy of the surrounding tissues that support the dentures.

Q. That is an estimate, that 20 per cent is due to normal conditions? A. Yes, sir.

Q. Have you ever done any work with the loss of hearing? A. Oh, yes.

Q. Have you done any work with the loss of hearing due to flying? A. No, sir.

Q. Are you familiar with the conditions of—

A. Yes, sir.

Q. (Continuing)—extensive flying, the noise of the engine causing a diminution of hearing?

A. Yes, sir.

Q. This all results from Mr. Price's flying, does it not?

A. You mean the loss of hearing?

Q. The accident. We are talking about a flying accident. [8]

(Deposition of Dr. R. E. Ramaker.)

A. Well, I think it is due to the accident myself. I cannot be quoted definitely on his occupation, however.

Q. Yes, sir. But the accident resulted from flying?

A. Well, apparently so.

Q. And that is what we are talking about?

A. Yes.

Q. Would you be able to say what percentage of this diminution of hearing resulted from the flying?

(Whereupon, there was an off-the-record discussion.)

A. I could not.

Q. And from your own experience, then, while you are willing to accept 20 per cent diminution of hearing by normal conditions, you are just assuming that there is a diminution of hearing because of what the wife said and by your test of raising your voice?

A. (Witness nods affirmatively.)

Q. You are not able to say that it in part is not a result of this flying in itself?

A. Well, I couldn't say that definitely, but in comparing patients where I have treated them here for loss of hearing that have never done any flying, there have been a lot of them.

Q. Yes, sir. But have you ever run across the loss of [9] hearing from flying?

A. No, sir, not to my knowledge.

Q. Well, I for one can say it happens. Now—

Mr. Reynolds: Well, Jack, I am sure you know more about that than I do, and—

The Witness: Well, I know it happens, but it hasn't come under any work I have done here.

(Deposition of Dr. R. E. Ramaker.)

Q. Then you would not be able to say that part of this condition of Mr. Price doesn't come from the fact that he has been flying?

Mr. Reynolds: Well, of course, this is all subject to the objection that as far as I know nobody has established that there can be any loss of hearing from flying yet.

(Whereupon, there was an off-the-record discussion.)

Q. There are many other things that can cause a loss of hearing, are there not?

A. Sure; traumatic conditions.

Q. Did you make any examination for the determination of any other causes for the loss of hearing?

A. No, nothing further. The only thing I did was took the measurements on the man.

Q. When you say "closure," I take it that is a difference [10] in space between the upper and lower teeth?

A. Yes. We have closures that I treat right along. Generally they run, oh, 2 or 3 millimeters.

Q. The injury was on the left lower—

A. Both sides.

Q. Well, the break itself, though, was on the left lower jaw, if I recall; is that right?

A. No; I think he had one over in here (Indicating). I did see the X-rays long ago, but I believe that McIntyre's testimony showed two breaks; didn't it?

Q. All right. My recollection was that you didn't recall which side it was.

A. No.

(Deposition of Dr. R. E. Ramaker.)

Mr. Reynolds: Well, I think McIntyre's testimony is that—Do you have a copy of his deposition, Jack?

Mr. Obenour: No, I don't.

Mr. Reynolds: I do.

Mr. Obenour: My notes show there was a fracture of the left side of the lower jaw from McIntyre.

Mr. Reynolds: I believe that is right, yes. Dr. McIntyre's testimony is that he had inter-oral lacerations to the retro-molar area on both sides, and a sub-condylar fracture with minimal displacement below the left mandible condyle. [11]

The Witness: That would be right here (Indicating).

Q. Now, when that healed, well, this diminution you are speaking of, as I understand it, it means that the jaw bone in effect would contract? A. Yes, sir.

Q. And that in turn, then, by reason of the present dentures, it would cause the juncture of the lower jaw to affect the hearing; is that the condition?

A. Well, not exactly that, no, sir. It is the fracture and the diminution of the mandible that caused a closure a unilateral closure in that event, and any closure of the mandible, forcing the mandible forward in a position forward from normal, well, as that does that, the closure increases and the pressure of the condyle into the glenoid fossa becomes more extreme, which in turn does block the hearing.

Q. Then, as I understand it, the closure was 80 per cent due to the accident and 20 per cent normal?

A. Well, I am just judging that, sir, in connection with the average patient that I see here.

Q. I see. So that in normal conditions there is a certain degree of change in closure that results—

(Deposition of Dr. R. E. Ramaker.)

A. There is a difference in the closure there, because that closure in the average patient, where no accident has [12] occurred, is due to trauma, to the fact that the dentures settle up and the lower settles down, and as it settles the jaw closes and the mandible comes forward.

Q. Yes, sir. But in normal conditions, if I understand you, this same condition results to a lesser degree?

A. Yes, sir. That is the 20 per cent I had there.

Q. Yes, sir. And when you say to open the bite, it simply means that it is changing the dentures so that they fit properly for the present condition of the jaw and to release the pressure to which you referred?

A. Opening the bite means to bring it back to as close to normal as you can.

Q. By changing the dentures?

A. The dentures, yes, sir.

Q. And that would involve one set of dentures, or at the most a second set, for a total of \$350.00?

A. Yes. An upper and lower set of dentures, the fee would be \$250.00, and then if the bite would have to be opened a little bit more, providing you couldn't open it all at one time, then instead of making a new set of dentures you convert the old into a new set of dentures without the full cost.

Q. At the time that you made these dentures—You made them a year ago?

A. December, 1956. [13]

Q. December of '56. At that time you made the dentures for a normal closure; is that correct?

A. I opened the bite at that time 3 millimeters on him.

(Deposition of Dr. R. E. Ramaker.)

Q. And then this diminution has been a gradual transition in the ensuing two years and nine months?

A. Yes, sir.

Q. And the hearing would be affected only at the juncture when the diminution of the mandible would increase this pressure in during this time; is that right, during this intervening two years and nine months?

A. Yes, sir.

Q. This would be a gradual transition, I take it?

A. Yes; normally, it is gradual, yes, sir.

Q. So that for the first year and a half or some such there had been no effect upon the hearing until the healing process resulted in this change of bite and increased pressure?

A. As I recall—You are right—As I recall, Mr. Price had some lower front teeth. I never saw him with any teeth, however. If he did have any teeth in his mouth of his own, even with an upper denture, it would prevent a considerable closure because these are constant down here.

Q. You know nothing about any history of his hearing, then, I take it, do you, Doctor?

A. No; only what he told me. His hearing had always been [14] all right, he told me that, but then that doesn't answer the question.

Q. And your determination was from the manner in which you spoke to him, and that was—

A. Yes.

Q. And information given to you by his wife?

A. That is right.

Q. And you are, I believe, a denture specialist, rather than—

A. That is all I do.

(Deposition of Dr. R. E. Ramaker.)

Mr. Obenour: We can move to strike the Doctor's testimony in regard to the hearing, being based on speculation and hearsay, and not within the scope of his experience as an expert, and that is all.

Mr. Reynolds: Well, you can certainly raise the objection; however, I don't think it is justified.

Redirect Examination

By Mr. Reynolds:

Q. Doctor, you stated during the examination by Mr. Obenour, I believe, that you had taken some measurement in connection with his closure of 8 millimeters, which you mentioned. Now, would those measurements have anything [15] to do with this pressure in the ear area which you mentioned from the closure?

A. Well, I simply take the normal measurement, which is 40 millimeters normally from here to this crease down here (Indicating).

Mr. Reynolds: Let the record show that that is from the base of the Doctor's nose to his—

The Witness: Crease in the lower lip.

Mr. Reynolds: Just below the lower lip, I think.

A. Right here (Indicating). We all have it, and that is very accurate, and 40 millimeters is normal, and when a closure begins you measure that as this closes together here (Indicating), and, in other words, this measurement from here to here again is a diminution there, which he has of 8 millimeters.

Q. In normal people, if there is a closure of the mandible of 8 millimeters, would that affect their hearing?

(Deposition of Dr. R. E. Ramaker.)

A. Oh, yes, yes, sir, if there is an 8 millimeter closure, yes, good gosh, yes.

Mr. Reynolds: I have no further questions.

Mr. Obenour: I don't, either.

(Witness excused.) [16]

Certificate

State of Washington, County of Pierce—ss.

I, Eugene E. Barker, Notary Public in and for the State of Washington, residing at Tacoma in said County and State, do hereby certify:

That the annexed and foregoing deposition upon oral examination of Dr. R. E. Ramaker, appearing at the instance of the Plaintiffs, was taken before me and reduced to typewriting under my direction; said deposition upon oral examination being taken at Seattle, Washington, on September 22nd, 1959, being completed on said day;

I further certify that said witness and the parties hereto waived the reading and signing by said witness of his deposition after the same was fully transcribed;

I further certify that all objections made at the time of said examination, to my qualifications or to the manner of taking said deposition upon oral examination, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to [17] said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that said deposition upon oral examination, as above transcribed, is a full, true and correct transcript of the testimony of said witness, including all questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am herewith securely sealing said deposition in an envelope, with the title of the above Causes thereon, and marked, "Deposition upon Oral Examination of Dr. R. E. Ramaker," and promptly delivering the same to the Clerk of the aforementioned Court;

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 29th day of September, 1959.

[Seal]

/s/ EUGENE E. BARKER,

Notary Public in and for the State
of Washington, residing at Tacoma. [18]

In the United States District Court
For the District of Arizona

No. Civ. 2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER TO INTERROGATORIES

In response to interrogatories heretofore propounded to them by the defendant, United States of America, plaintiffs being first duly sworn, say as follows:

Interrogatory No. 1

The answer to Interrogatory No. 1 is as follows: The residence address of the plaintiffs, William Carl Cunningham and his wife, is and since before October, 1953, has been Vashon Island, King County, Washington.

Interrogatory No. 2

In answer to Interrogatory No. 2 plaintiffs state that the deposition, with a representative of the defendant present, was completed on September 22, 1959, of Dr. Forrest L. Flashman, of Seattle, Washington, with regard to injuries sustained by William Carl Cunningham, to his back, in the accident which is the subject of this action. Reference is made to said deposition for details concerning the injuries to said back. In addition thereto plaintiffs state that the plaintiff, William Carl Cunningham, received numerous lacerations of the face, most serious of which was a cut above the left eye, and numerous bruises and contusions.

Interrogatory No. 3

With regard to the injuries to plaintiff's back, reference is made to the deposition of Dr. Flashman, hereinabove referred to. In brief summary plaintiff states that he was in a body cast from October 18, to November 1, 1956, in an Abbot Hypertensive Brace from approximately November 1, 1956, to approximately January 2, 1957, continuously; in the brace from approximately January 2, 1957 to February 12, 1957, except when in bed at night; and was required to use said brace for steadily decreasing periods from and after February 12, 1957, until sometime in the summer of 1957. That residual injuries to said back resulted in permanent disability of approximately thirty percent (30%) of the normal use of said back. Specifically the injuries sustained to said back were compression fracture of the second lumbar vertebra, with concurrent severe strain to the entire lumbar spinal column.

With regard to the lacerations to plaintiff's face, the numerous sutures taken therein were removed by Dr. Flashman. No great or permanent disability resulted therefrom, except that plaintiff has a scar, approximately the size of a dime, in the inner edge of his left eyebrow, which scar is permanent in nature.

Interrogatory No. 4

Plaintiff, William Carl Cunningham, was confined to the Memorial Hospital in Phoenix, Arizona, for the period from October 18, 1956 until October 22, 1956.

Interrogatories No. 5 and No. 6

While plaintiff, William Carl Cunningham, was not confined to his home as a result of said accident, as stated hereinabove, he was in a body cast or hyperten-

sive brace continuously until approximately January 2, 1957, and for gradually decreasing periods of time thereafter, and his physical activities were severely impaired as a result thereof. Because of the residual injuries to plaintiff's back his physical activities were impaired; he can do no heavy lifting, which is necessary in his business and cannot perform ordinary and necessary work at his home, nor engage in many of the activities which he could before the accident. This disability is expected to be permanent.

Interrogatory No. 7

Plaintiff, William Carl Cunningham, was treated by Dr. Stovall and Dr. Maresca in Phoenix, Arizona, from October 18, 1956 until October 22, 1956, while in the hospital in Phoenix, and has been treated by Dr. Flashman of Seattle, Washington since October 22, 1956. For the number of visits and treatments by Dr. Flashman, reference is made to his deposition hereinabove referred to.

Plaintiff further states that his spectacles were broken in the accident and he obtained new spectacles from Dr. Robert P. Jonas of Vashon Island, King County, Washington. The charges of each doctor incurred are as follows:

Dr. Stovall (Phoenix, Arizona)	\$ 250.00
Dr. Maresca (Phoenix, Arizona)	50.00
Dr. Flashman (Seattle, Washington).....	278.00
Dr. Jonas (Spectacles)	40.30
Total	<u>\$ 618.30</u>

Interrogatory No. 8

Paid to Memorial Hospital

(Phoenix, Arizona)\$ 228.05

Interrogatory No. 9

Paid to Phoenix Ambulance Service (Emergency Service in Phoenix)	\$ 55.53
Charles C. Cullen Co., 8th and Olive Way, Seattle, Washington (Abbot Hypertension Brace, ordered by Dr. Flashman)	\$ 67.17
	<hr/>
	\$ 122.70

Interrogatories No. 10 through 14

Plaintiff, William Carl Cunningham, was self-employed at the time of the accident, being the owner and operator of the Vashon Island Tavern. Plaintiff, William Carl Cunningham was required to be absent from said business, in a large part, until the spring of 1957, and because of the residual injuries to his back has been unable to engage in the operation of said business to the extent he was before the time of the accident, and as a result thereof it has been, and is necessary for him to hire additional employees, and to increase the time spent of employees who were formerly part-time employees, to the extent that he has and will continue permanently to pay said employees approximately \$1500.00 per year in additional wages. Plaintiff, William Carl Cunningham is presently 51 years old and will reach the age of 52 years in October, 1959. Said plaintiff expects to own and operate said tavern for an indefinite period of time in the future. Plaintiff has filed Federal Income Tax Returns for each of five years preceding the accident, and for all years since, with the Director of Internal Revenue at Tacoma, Washington.

Interrogatory No. 15

Plaintiff's itinerary on the day of the accident, to-wit, October 18, 1956, was as follows:

Left San Angelo, Texas, at 10:07 A.M.; arrived Wink, Texas, at 11:37 A.M.;

Left Wink, Texas, at 12:40 P.M.; arrived at El Paso, Texas, at 2:10 P.M.

Left El Paso, Texas, at 3:07 P.M.

Interrogatory No. 16

No civil or criminal action has been instituted against either of the undersigned plaintiffs as a result of the aircraft accident on October 18, 1956.

Interrogatory No. 17

Other than the instant case no civil action has been instituted by either of the plaintiffs as a result of the aircraft accident of October 18, 1956.

/s/ WILLIAM CARL CUNNINGHAM.

Subscribed and sworn to before me this 25th day of September, 1959.

/s/ CHARLES H. LAW,

[Seal] Notary Public in and for the State
of Washington, residing at
Vashon.

My Commission expires Sept. 24, 1960.

/s/ VERA MAE CUNNINGHAM.

Subscribed and sworn to before me this 25th day of September, 1959.

/s/ CHARLES H. LAW,

[Seal] Notary Public in and for the State
of Washington, residing at
Vashon.

My Commission expires Sept. 24, 1960.

[Endorsed]: Filed Oct. 2, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, Oct. 5, 1959, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

These cases are called for pre-trial conference at this time. Wm. E. Eubank, Esq., Assistant United States Attorney, is present for the Government. Virginia Hash, Esq. and Edgar Hash, Esq. appear as counsel for the plaintiffs.

Counsel for the plaintiffs move for continuance on ground they have been advised plaintiffs will be unable to attend trial.

It Is Ordered that further pre-trial conference be dispensed with at this time and that any further proceedings herein be continued until time set for trial October 6, 1959 at ten o'clock a.m.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Tuesday, Oct. 6, 1959, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District.
Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

These cases come on regularly for trial this day. Virginia Hash, Esq., and Edgar Hash, Esq., appear for the plaintiffs. Wm. E. Eubank, Esq., Assistant United States Attorney appears for the Government.

Said counsel for plaintiffs now move for leave to withdraw as counsel for both plaintiffs, neither of whom is present.

Counsel for the Government announces ready for trial.

It Is Ordered that Virginia Hash and Edgar Hash are allowed to withdraw as counsel for the plaintiffs, and

It Is Ordered that each of these cases, Civ-2962 Phoenix and Civ-2963 Phoenix be, and hereby is dismissed.

(docketed 10-6-59)

District Court of the United States
District of Arizona

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF COSTS
AND DISBURSEMENTS

Disbursements

Marshal's Fees	\$ 15.40
Clerk's Fees	
Reporter's Fees (Depositions)	58.35
Docket Fee	20.00
Examiner's Fees	
Witness Fees	
Costs incident to taking of depositions	10.20
Total	\$103.95

United States of America, District of Arizona—ss.

William E. Eubank, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that

the services charged therein have been actually and necessarily performed as therein stated.

/s/ WILLIAM E. EUBANK.

Costs taxed as claimed in the sum of \$103.95 on Oct. 19, 1959 and entered in J. D.

/s/ By MELVIN F. LARSON,
Deputy Clerk

Subscribed and sworn to, before me, this 16th day of October, A.D. 1959.

[Seal] /s/ KATHERINE CLARK,
Deputy Clerk, United States District Court, District of Arizona.

[Endorsed]: Filed Oct. 16, 1959.

District Court of the United States
District of Arizona

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband and wife,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

Marshal's Fees\$ 15.40

Clerk's Fees

Reporter's Fees (Depositions)	62.35
Docket Fee	20.00
Examiner's Fees	
Witness Fees	12.00
Costs incident to taking of depositions	10.20
Total	\$119.95

United States of America, District of Arizona—ss.

William E. Eubank, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ WILLIAM E. EUBANK.

Costs taxed as claimed in the sum of \$119.95 on Oct. 19, 1959 and entered in J. D.

/s/ By MELVIN F. LARSON,
Deputy Clerk.

Subscribed and sworn to, before me, this 16th day of October, A.D. 1959.

[Seal] /s/ KATHERINE CLARK,
Deputy Clerk, United States Dis-
trict Court, District of Arizona.

[Endorsed]: Filed Oct. 16, 1959.

In the United States District Court
For the District of Arizona

No. Civ. 2962 Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. Civ. 2963 Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM IN OPPOSITION TO
THE MOTION UNDER RULE 60

Comes Now defendant under Rule 9, Rules of this Court, and moves the Court to deny the motion filed herein by Greive and Law under Rule 60 for the following reasons:

A. Former plaintiffs' attorney has not complied with Rule 1 of this Court and is not an attorney of this Federal Bar, consequently the motion should be denied.

B. Former plaintiffs' attorney has not complied with Rule 9 of this Court and has failed to support his

motion with a brief or memorandum, consequently the motion should be denied.

/s/ JACK D. H. HAYS,

United States Attorney,

/s/ WILLIAM E. EUBANK,

Assistant U. S. Attorney,

Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 31, 1959.

[Title of District Court and Cause.]

MOTION FOR SECURITY OF
COSTS and NOTICE

Comes Now the defendant and represents the following to the Court:

1. The above captioned matters came on regularly for trial on October 8, 1959; when the cause was called for trial the plaintiffs were not prepared to try the case; defendant, however, was ready to defend the case.

2. Because of the foregoing circumstances, the Court dismissed plaintiffs' action for want of prosecution and costs were awarded defendant.

3. Costs awarded defendant against William Carl Cunningham and Vera Mae Cunningham were in the sum of \$103.95; costs awarded defendant against Glenn A. Price and Jane Doe Price were in the sum of \$119.95.

4. Plaintiffs were notified of cost award by teletype, dated October 16, 1959, addressed to Mr. Robert M. Reynolds, c/o Metzger, Blair and Gardner, Attor-

neys at Law, Tacoma Building, Tacoma 2, Washington; no reply has been received to this date and said costs are still unsatisfied.

5. Plaintiffs have now improperly filed an unsupported motion under Rule 60, Federal Rules of Civil Procedure, with this Court.

Wherefore, the government prays that the Court require the plaintiffs to post a security bond for defendant's costs in the sum of \$500.00, or cash, with the Clerk of this Court within twenty days hereof and prior to any consideration by the Court of any motion on behalf of the plaintiffs.

JACK D. H. HAYS,
United States Attorney.

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

NOTICE

To: Messrs. Greive and Law, Attorneys for Plaintiffs,
4456 California Avenue, Seattle 16, Washington.

Please Take Notice that the United States will cause the foregoing Motion to come on for hearing before the United States District Court, United States Courthouse, Phoenix, Arizona, on January 18, 1960, at 10:00 a. m. in the forenoon, or as soon thereafter as counsel for the government can be heard.

JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 6, 1960.

[Title of District Court and Cause.]

NOTICE

To: R. R. Bob Greive, Attorney for Plaintiffs herein.

Please Take Notice that defendant will cause the following Motions to be heard before the Court on Monday, February 8, 1960, in the United States District Court for the District of Arizona, United States Courthouse, Phoenix, Arizona, at 10:00 a. m., or as soon thereafter as counsel may be heard:

Plaintiffs' Motion to Vacate Judgment under Rule 60 and Defendant's Motion for Security of Costs.

Dated this 25 day of January, 1960.

JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 25, 1960.

[Title of District Court and Cause.]

SATISFACTION OF MEMORANDUM OF
COSTS

The costs in the above-entitled cases having been paid, the Clerk of the United States District Court for the District of Arizona is hereby authorized and

empowered to satisfy the Memorandum of Costs filed in the above-entitled cases.

JACK D. H. HAYS,
United States Attorney,

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

Dated this 25 day of January, 1960.

[Endorsed]: Filed Jan. 25, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: Monday, Feb. 8, 1960, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

Plaintiffs' Motion to Vacate Judgment pursuant to Rule 20 and Defendants' Motion for Security of Costs are called for hearing this day. William E. Eubank, Esq., Assistant United States Attorney, appears for the Government. Robert Greive, Esq. appears for plaintiffs. On motion of Robert Grieve, Esq.

It Is Ordered that Herbert Mallamo, Esq. be entered as associate counsel for the plaintiffs.

Said Motion to Vacate Judgment is argued by respective counsel.

It Is Ordered the record show said motions are submitted.

United States District Court

District of Arizona

Phoenix Division

Consolidated Cases

No. Civ-2962-Phx

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. Civ-2963-Phx

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF AUTHORITIES IN SUP-
PORT OF MOTION TO OPEN AND VA-
CATE JUDGMENT

Come Now the plaintiffs jointly and individually and offer the court authorities in support of their joint motion to open, set aside, and vacate judgment under Rule 60, Federal Rules of Civil Procedure, as follows:

- (1) Does the Court Have Inherent Power to Open and Vacate a Judgment?
- (2) Does the Court Have Power to Open and Vacate an Improvident or Premature Judgment?

(3) Does a Meritorious Claim Affect the Court's Power to Open and Vacate Judgment?

Introductory Facts

The claimant-petitioners were previously in court on the date of trial, as shown by affidavits annexed hereto by reference. They were unable to pursue their action, and judgment was entered (or terms imposed) against them for failure to prosecute their claim against the defendant. They have since retained present counsel, contacted witnesses (see attached affidavits) and this is the first opportunity to present the clear facts before the court in an attempt to reinstate their claim of negligence against the defendant, under Rule 60, Federal Rules of Civil Procedure.

The claimant-petitioners have satisfied the terms imposed upon them, entitled "costs," and offer a bond for security for costs as a part of their showing of good faith, in the sum of five hundred dollars, as per request of counsel for the defendant. They respectfully submit that they have a justiciable claims as alleged in their pleadings, and that through mistake, excusable neglect, improvidence not of their own making, and unavoidable casualty, they were deprived of having their day in court whereby their meritorious claim should have been pursued to judgment against the defendant.

I. Does the Court Have Inherent Power to Open and Vacate a Judgment?

Generally, courts have inherent power to control, amend, and vacate their judgments under proper circumstances, although statutes do limit the power occasion-

ally. In the absence of a statute to the contrary, courts, under proper circumstances, may control, amend, open, and vacate their own judgments, *Illinois Printing Co. v. Electric Shovel Coal Corp.*, 20 F. Supp. 181; *Petway v. Dobson*, 46 F. Supp. 114. This power is inherent and independent of statutes, *Peters v. Mutual Life Ins. Co. of New York*, 17 F. Supp. 246 (reversed on other grounds).

Unless otherwise provided by statute, a court ordinarily does not lose its power to open and vacate judgment merely on the lapse of the statutory period during which an appeal may be taken, *Denholm & McKay Co. v. Commissioner of Internal Revenue*, 132 F. (2d) 243. In the absence of a statute to the contrary, a court has full control over its orders or judgments and may, on sufficient cause shown, open or vacate its judgments, *Zimmern v. U. S.*, 56 S. Ct. 706, 298 U. S. 167; *U. S. v. Benz*, 51 S. Ct. 113, 282 U. S. 304; *Sun Oil Co. v. Buford*, 130 F. (2d) 10 (reversed on other grounds); *Suggs v. Mutual Ben. Health & Accident Assn.*, 115 F. (2d) 80; *Arcoil Mfg. Co. v. American Equitable Assur. Co. of New York*, 87 F. (2d) 206; *American Guaranty Co. v. Caldwell*, 72 F. (2d) 209; *Associated Mfrs. Corp. of America v. DeJong*, 64 F. (2d) 64; *Obear-Nester Glass Co. V. Hartford-Empire Co.*, 61 F. (2d) 31; *Massachusetts Fire & Marine Ins. Co. v. Schmick*, 58 F. (2d) 130; *Gentry v. State of Missouri ex rel. and to the use of Butler*, 32 F. (2d) 159; *McCandless v. Haskins*, 28 F. (2d) 693; *Cudahy Packing Co. v. City of Omaha*, 24 F. (2d) 3 (cert. den.); *Chicago, M. & St. Paul Ry. Co. v. Leverentz*, 19 F. (2d) 915 (cert. den.); *Maison Dorin Societe Anonyme v. Arnold*, 16

F. (2d) 977; (cert. den.); Penn. R. R. Co. v. Montgomery, 6 F. (2d) 836; In re Vardaman Shoe Co., 52 F. Supp. 562; Leslie v. Floyd Gas Co., 11 F. Supp. 401; Greyerbiehl v. Hughes Electric Co., 294 Fed. 802 (cert. den.); etc.

In accordance with the rules governing the power and control of courts over their judgments as discussed in the preceding paragraph, it has been held that the inherent power of a court to open or vacate its judgment may be exercised at any time when the judgment is void, or when there has been a procedural or jurisdictional defect or where a question of fraud or other collateral issue is raised, Prudential Ins. Co. of America v. Zimmerer, 66 F. Supp. 492. The statute will not prevent the courts from acting on other grounds or causes which would be good and sufficient at common law, and an application based on such a ground is not governed by statute. In general a judgment can be set aside for various reasons even though it is not reversible, Ladd v. Stevenson, 19 N.E. 842 (N.Y.); North River Ins. Co. of City of New York v. Militello, 67 P. (2d) 625 (Colo.).

II. Does the Court Have Power to Open and Vacate An Improvident or Premature Judgment?

A judgment may be set aside where it was entered by the clerk without any authority therefor, whether his entry thereof was the result of mistake, inadvertence, or wrongful intent, and the same is true where the entry was ordered by the court inadvertently, improvidently or under a mistake. A judgment may be stricken off where it is entered without authority or by mis-

take. It has also been held that a judgment may be set aside where it was prematurely entered. *O'neil v. Norton*, 33 S.W. (2d) 733 (Tex.); *Carter v. Shin-sako*, 108 P. (2d) 27 (Calif.).

III. Does a Meritorious Claim Affect the Court's Power to Open and Vacate Judgment?

If the party applying for an order opening or vacating a judgment shows the court he has a good and meritorious claim or defense, he is entitled to the order, *Koen v. Beardsley*, 63 F. (2d) 595; *Peters v. Mutual Life Ins. Co. of New York*, 17 F. Supp. 246 (reversed on other grounds).

IV. Mistake, Inadvertence, Surprise, Excusable Neglect, Casualty, or Misfortune.

A judgment taken against a person by mistake of fact, whereby the plaintiff fails to secure all to which he is entitled, a mutual mistake or misunderstanding of the parties, or a mistake of the court arising from misinformation or misunderstanding, or other mistake, may be set aside, *Newton v. Weaver*, 18 F. Cas. No. 10,193 (C.C.,D.C.). An irregular judgment for defendant, rendered in plaintiff's absence, should have been vacated and case restored to docket for trial on merits, *Snow Hill Live Stock Co. v. Atkinson*, 126 S.E. 610 (Ark.).

In a proper case, a trial court may open or vacate a judgment entered against a party as a result of the accident, mistake, negligence, or surprise of the party's attorney, *Lovell v. Lovell*, 176 N.E. 210 (Mass.); *Collins v. National Bank of Commerce of San Antonio*, 154 S.W. (2d) 296; *Slatoski v. Jendro*, 159 N.W. 752 (Minn.).

A party may also have an adverse judgment opened or vacated on the ground that he was prevented by unavoidable casualty or misfortune from properly prosecuting or defending, when the casualty is from causes beyond the party's control, *In re Cox*, 33 F. Supp. 796. If a party is prevented by sickness from preparing his case or attending the trial, and the circumstances are such that his personal attention and presence are necessary to the due protection of his rights, a judgment against him may be set aside on the ground of "casualty or misfortune" or "excusable neglect," *Baker v. Owensboro Sav. Bank & Trust Co.'s. Receiver Co.*, 130 S.W. 969 (Ky.).

GREIVE AND LAW,
/s/ R. R. BOB GREIVE,
Attorneys for Claimants.

Office & Post Office:
4456 California Avenue,
Seattle 16, Washington,
Telephone: WEst 7-4111

In the United States District Court
For the State of Arizona

Phoenix Division

No. 2962 Phx

No. 2963 Phx

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife, and
GLENN A. PRICE and JANE DOE PRICE,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVITS

Come Now the plaintiffs and respectfully submit the
attached affidavits of T. A. Loomis, M.D., Ph.D.; W.
R. Gott, Joseph W. Bruce and Theresa M. Jessie.

GREIVE AND LAW,
/s/ By R. R. BOB GREIVE,
Attorneys for Plaintiffs.

Office and Post Office Address:

4456 California Avenue,
Seattle 16, Washington,
Telephone: WE 7-4111.

State of Washington, County of King—ss.

T. A. Loomis, being first duly sworn on oath, deposes and says: That he is a Doctor of Medicine, and operates a laboratory for toxicological investigations maintained by the State of Washington, at the University of Washington, School of Medicine; that he has conducted and published research materials on the effects of alcohol and on the dissipation of action of alcohol in human subjects; that he has conducted classes for police officers and others on the subject of alcohol and its effects on the human body for a period of many years; that he has made many lectures and a television "short" or recording on the subject, has made both personal appearances and on television, and has testified as an expert witness in many cases in the Courts of the State of Washington, and elsewhere, on the subject of liquor and its effects on the human being, and its dissipation.

Assuming that Mr. Cunningham and Mr. Price consumed liquor on October 3rd, 1959, and assuming further that they were intoxicated; assuming that Mr. Price had no alcoholic beverage for some 58 hours and that the trial date was set for Tuesday, October 6th, 1959, and assuming further that Mr. Cunningham had some liquor the following day, or on October 4th, and had no liquor or other intoxicating beverage after noon of said day, and assuming that at 2:00 o'clock P. M. on October 5th, 1959, Miss Virginia Hash and her brother, Edgar Hash, went to the hotel to discuss the case with Mr. Price and Mr. Cunningham, that it would have been physically impossible for either Mr. Price or Mr. Cunningham to have been under the influence of intoxicating liquor, and even assuming that Mr. Cunningham

was still under the influence, or partially under the influence of intoxicating liquor at 2:30 p.m. on October 5th, there would have been sufficient time in the remaining 19 hours to have sobered to the point that there would have been little, or a very minimal effect of alcohol still present at the time of trial on October 6th, 1959.

That affiant further states his reasons for the above opinion are as follows:

Acute intoxication with alcohol involves adequate consumption of this material to the extent that symptoms and behavior characteristic of alcoholic intoxication are manifested. The amount of alcohol necessary to produce such temporary symptoms without producing death varies within definite limits between individuals. Assuming that maximum acute non-lethal alcoholic intoxication occurs in an average adult human, and assuming that the individual then ceases the consumption of alcohol, in such an average adult human the alcohol within the body necessary to produce maximum acute non-lethal intoxication would be metabolized and excreted at a rate adequate so that at 24 hours following the cessation of the drinking, the alcohol would be practically absent from the body. Furthermore, any toxic symptoms from acute alcoholic intoxication and caused by alcohol would be absent from the subject.

/s/ T. A. LOOMIS, M.D.

Subscribed and Sworn to before me this 10 day of December, 1959.

/s/ GRACE UYEDA,

[Seal]

Notary Public in and for the State
of Washington, residing at
Seattle.

State of Arizona, County of Maricopa—ss.

W. R. Gott, being first duly sworn, upon his oath, deposes and says:

My name is W. R. Gott; I live at 515 East Moreland, Phoenix, Maricopa County, Arizona. I am employed as Desk Clerk at the Sahara Motor Hotel, located at 401 North First Street, Phoenix, Arizona and was so employed on October 4, 1959.

Around noon on Sunday, October 4, 1959, Mr. G. A. Price came to me explaining he and Mr. W. C. Cunningham had a court case coming up Tuesday morning and that he was worried about Mr. Cunningham and asked me to request the bar not to serve him any more drinks.

I told the bartender not to serve Mr. Cunningham or Mr. Price and further directed the relief man be told not to serve them either. I found out some time later that Mr. Price had contacted the bell boys and told them not to bring any liquor to their room if any was ordered.

On Monday, October 5, 1959, some time before lunch I had a short conversation with both Mr. Price and Mr. Cunningham and, in my opinion, both looked and acted normal and I did not notice any trace of odor.

Further affiant sayeth not.

/s/ W. R. GOTT.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,
Notary Public.

My commission expires: April 4, 1960.

State of Arizona, County of Maricopa—ss.

Joseph W. Bruce, being first duly sworn, upon his oath deposes and says:

My name is Joseph W. Bruce.

I live at 4201 West Cavalier Drive, Glendale, Arizona.

On October 4, 1959, I was employed at the Sahara Motor Hotel, 401 North First Street, Phoenix, Arizona, as a bartender.

On Sunday, October 4, 1959, I was told by Desk Clerk Bob Gott that I was not to serve either Mr. W. C. Cunningham or Mr. G. A. Price any drinks and, at the end of my shift, I was to pass this information on to my relief and this I did when he arrived about 5:30 p.m.

They came in once during my shift and ordered 7-Up. This was some time late afternoon or early evening. They stayed for quite a while.

I was surprised as I assumed that drinks had been cut off for the reason they had already had enough and as near as I could tell, both talked and acted O.K.

I later found out that both Mr. Price and Mr. Cunningham had requested no drinks as a precautionary measure.

Further affiant sayeth not.

Dated this 8th day of November, 1959.

/s/ JOSEPH W. BRUCE.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,

Notary Public.

My commission expires: April 4, 1950.

State of Arizona, County of Maricopa—ss.

Theresa M. Jessie, being first duly sworn, upon her oath deposes and says:

My name is Theresa M. Jessie. I reside at 464 South LeBaron Street in Mesa, Arizona.

On October 6, 1959, I was employed as a sales clerk in the gift shop at the Sahara Motor Hotel, 401 North First Street, Phoenix, Arizona.

Mr. W. C. Cunningham came in the gift shop several times buying different items, mainly two sets of ash trays and two sets of Indian dolls. He told me they were for his wife and a friend's wife and so he wanted his friend, Mr. Price (Mr. G. A. Price) to approve them. When Mr. Cunningham and Mr. Price left on Tuesday, October 6, 1959, they were both completely sober to the best of my knowledge.

Further affiant sayeth not.

Dated this 8th day of November, 1959.

/s/ THERESA M. JESSIE.

Subscribed and sworn to before me this 8th day of November, 1959.

[Seal] /s/ SHIRLEY R. ORD,
Notary Public.

My commission expires: April 4, 1960.

State of Washington, County of King—ss.

Dr. Forrest L. Flashman, being first duly sworn on oath, deposes and says: That he is a medical doctor, specializing in orthopedic practice; that he was treating William Cunningham for a back condition when in mid-August, 1959, there was a flare up; that in the early part of September it was determined this flare up was the result of an acute case of shingles; that shingles is a very painful and aggravating condition; that as a result of this condition, Mr. Cunningham's history indicates he lost considerable sleep and required extensive pain killers; that he prescribed Emperin with codeine which is a narcotic and Darvin compound which is a muscle relaxant; that when he last saw Mr. Cunningham on September 16, 1959 he was still suffering from shingles and still had a part of the above named prescription in his possession.

/s/ FORREST V. FLASHMAN.

Subscribed and sworn to before me this 26th day of December, 1959.

[Seal] /s/ R. R. BOB GREIVE,

Notary Public in and for the
State of Washington, residing
in Seattle.

In the United States District Court
for the State of Arizona

Phoenix Division

No. 2962 Phx.

No. 2963 Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife, and
GLENN A. PRICE and JANE DOE PRICE,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

AFFIDAVIT

State of Washington, County of King—ss.

G. A. Price, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he and Mr. Cunningham flew to Phoenix, Arizona on October 1, 1959 for the purpose of appearing as plaintiffs and witnesses; that on the way down he had a drink with his dinner; that he again, accompanied by Mr. Cunningham, participated in drinking alcoholic beverages on the night of October 3, 1959 and became intoxicated at that time; that Mr. Price did not imbibe in alcoholic beverages from that time until after the time set for trial on October 6, 1959, which is a period of 58 hours; that on Sunday, October 4, 1959 he contacted the desk clerk at the Sa-

hara Motor Hotel and informed him that both the affiant and Mr. Cunningham were to appear in a court action on Tuesday and as a precautionary measure they did not want any further drinks served to either of them.

Affiant further states: That on Monday, October 5, 1959, at 2:00 o'clock p. m., when the affiant was fully sober, Miss Hash and her brother Edgar came to the hotel to discuss the impending law suit. At that time Miss Hash reacted violently, in particular to the appearance of Mr. Cunningham, who had been suffering from shingles. Miss Hash contended both the affiant and Mr. Cunningham gave the appearance of being drunk. The affiant said he had had no liquor or other intoxicating beverages since Saturday about midnight, a period of 38 hours, that he was sober and intended to be sober at the time of the trial, to which Miss Hash countered the Judge would throw the case out of court and possibly throw both of them in jail; that the affiant, not being acquainted with any other lawyer in the city of Phoenix, was forced to accept whatever disposition Miss Hash decided to make of the matter; that the affiant admits he and Mr. Cunningham should not have become intoxicated on Saturday night.

Affiant further states: That he does not question the sincerity of Miss Hash in her belief that Mr. Cunningham was intoxicated, but in the opinion of the affiant Mr. Cunningham was not drunk; that under the circumstances he feels the matter should have been

continued until such time as he could have arranged for other counsel and it should not have been dismissed with prejudice.

/s/ G. A. PRICE.

Subscribed and sworn to before me this 9th day of December, 1959.

[Seal]

/s/ R. R. BOB GREIVE,

Notary Public in and for the
State of Washington, residing
at Seattle.

In the United States District Court
for the State of Arizona

Phoenix Division

No. 2962 Phx.

No. 2963 Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife, and
GLENN A. PRICE and JANE DOE PRICE,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

State of Washington, County of King—ss.

William Cunningham, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in

the above entitled action which was dismissed with prejudice on October 5, 1959, on the grounds the affiant and Mr. G. A. Price were inebriated and thus incapacitated and unable to continue as plaintiffs; that prior to October 1, 1959 affiant had not drunk any intoxicating liquor for more than a year; that upon October 1, 1959 the affiant had one drink with his dinner and on the night of October 3, 1959, while dining in one of the local restaurants in Phoenix, the affiant did become intoxicated; that on Sunday, October 4, 1959 the affiant had two bottles of beer but he had no further alcoholic beverages after twelve o'clock noon on that day.

As a precautionary measure, Mr. G. A. Price contacted Mr. Gott, the desk clerk at the Sahara Motor Hotel, and asked him not to serve either he or Mr. Cunningham any more alcoholic beverages and they were not given any either at the hotel or anywhere else after twelve o'clock noon October 4, 1959; that at approximately two o'clock Monday, October 5, 1959, Miss Virginia Hash and her brother Edgar Hash came to the hotel to discuss the case; that for two weeks immediately prior to September 30, 1959 the affiant had been under treatment for shingles by Dr. John Stewart and Dr. Forrest Flashman, 1120 Cherry Street, Seattle, Washington and Dr. Groh of Vashon, Washington; that he was experiencing considerable pain and discomfort and his physical appearance had changed drastically during the ten days immediately preceding the trip to Phoenix and in fact he had lost 25 pounds which left him in a weakened condition, presenting a

shaky and unsteady appearance, with his eyes red from lack of sleep and there was some question as to whether or not he would be able to go to Phoenix for the trial of the above entitled action; that while neither the affiant nor Mr. G. A. Price had drunk any intoxicating liquor for more than twenty-four hours, the affiant did present a very poor physical appearance because of loss of sleep and loss of weight which was the result of his attack of shingles and there is no question that his attorney, Miss Hash, believed the affiant was intoxicated; that Miss Hash and the client had a disagreement over this question, and she informed the affiant she would be unable to continue with his case; that Miss Hash contended that even though some third party might question whether or not the affiant was sober, nevertheless they had been drinking the day before and the appearance presented by the affiant was so poor that in her opinion the judge would be unwilling to permit the trial and there was a strong possibility he might hold Mr. Price and the affiant in contempt of court and as a result they might end up in jail.

Affiant further states: That under these circumstances he was in a helpless position, not being acquainted with any other lawyers in the city of Phoenix and realizing no other lawyer would be able to prepare his case in the twenty hours which remained before trial, so the affiant had no choice but to accept the situation as presented by Miss Hash; that the affiant does not believe his case should have been dismissed with prejudice; that he feels he has a good cause against the U. S. Government.

Affiant further states: That he was not drunk and while he does not question Miss Hash's sincerity, he does feel she was mistaken.

/s/ WILLIAM C. CUNNINGHAM.

Subscribed and sworn to before me this 9th day of December, 1959.

[Seal] /s/ R. R. BOB GREIVE,
Notary Public in and for the
State of Washington, residing
at Seattle.

[Endorsed]: Filed Feb. 8, 1960.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 60.

Comes Now the defendant pursuant to the authorization of the Court on Monday, February 8, 1960, at the hearing held on that day, and files its Supplemental Memorandum.

The Court will recall that on the date of the hearing plaintiffs' counsel appeared in person, associated local counsel, and filed this Memorandum of Authorities in Support of Motion to Open and Vacate Judgment. The effect of the memorandum is to abandon paragraphs 1, 3, 4, and 5 of their Motion to Vacate

Judgment and base the motion on paragraphs 2 and 6 which are as follows:

* * *

“2. Mistake, inadvertence, surprise, or excusable neglect;”

* * *

“6. Any other reasons justifying relief from the operation of the judgment of dismissal, as presented by the plaintiffs in affidavits submitted herewith.”

* * *

In order to save space and time I will comment on each paragraph discussed by the plaintiffs:

I. Does the Court have inherent power to open and vacate a judgment? In Federal Court under the Federal Rules of Civil Procedure “inherent” is a moot point. There is express authority under Rule 60 for the United States District Courts to review their judgments and orders. It has been repeatedly held that a motion under Rule 60(b) is addressed to the sound discretion of the Court:

Independence Lead Mine Co. vs. Kingsbury (C. C. A. 9—1949) 175 F. 2d 983, cert. den. 338 U. S. 900;

Stafford vs. Russel, (C. C. A. 9—1955) 220 F. 2d 853;

Perrin vs. Aluminum Co. of America (C. C. A. 9—1952) 197 F. 2d 254;

Cole vs. Fairway Dev., (C. C. A. 9—1955) 226 F. 2d 175;

Clarence A. Kolstad vs. United States (C. C. A. 9—1959) F. 2d (Jan. 7, 1959, No. 15871).

II. Does the Court have power to open and vacate an improvident or premature judgment? There is no question but that within the Court's sound discretion, as outlined in I, heretofore, that the Court has such power. In this case, however, there is no judgment. The Court dismissed the plaintiffs' cases for failure to prosecute. The Court will recall that we met in chambers before the time set for trial; that we went into open Court at the time set for trial; that the cases were called and the plaintiffs were not ready while the defendant was ready; that plaintiffs' counsel requested to withdraw as counsel and that the request was granted; and finally, that my motion for dismissal and costs for failure to prosecute was granted under Rule 14, Rules of this Court.

There is no judgment to be set aside under Rule 60 (b). Plaintiffs need only file their action again.

III. Does a meritorious claim affect the Court's power to open and vacate judgment? Apparently not. Paragraph I stands for the proposition that the sound discretion of the Court is the basis of the determination and not a meritorious claim.

IV. Mistake, inadvertence, surprise, excusable neglect, casualty or misfortune. Apparently plaintiffs' contention is that they were not so drunk on the morning of the trial that they couldn't have appeared and prosecuted the case if their own attorneys had not kept them out of the Courthouse. The fact is clear, however, that they did not appear at the Courthouse at the time and place designated for trial. They are, we suppose, mature persons. They knew the time and place of trial through their attorney in Tacoma, Washington.

and it appears strongly probable that they must have been in an alcoholic fog or else they would have navigated their persons to the appointed place of the trial regardless of what counsel told them. We were not contacted by the plaintiffs on the trial date, or thereafter, with protestations that they had been misused or prevented from appearing.

Conclusion: This case was dismissed for want of prosecution. Plaintiffs may file the action again if they so desire. The degree of drunkenness of the plaintiffs seems like a very poor basis upon which to exercise sound discretion and set aside the order of dismissal. Defendant prays that the Court deny the motion.

/s/ JACK D. H. HAYS,
United States Attorney,
/s/ By WILLIAM E. EUBANK,
Assistant United States Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 14, 1960.

[Title of District Court and Cause.]

MINUTE OF THE COURT

Dated: Thursday, April 28, 1960, at Phoenix, Ariz.

Honorable Dave W. Ling, United States District Judge, presiding.

Civ-2962 Phoenix

Civ-2963 Phoenix

It Is ordered that Plaintiffs' Motion to Vacate Judgment is denied.

(Docketed 4/28/60.)

Fidelity and Casualty Company
Of New York
Home Office New York

In The United States District Court,
For The State Of Arizona
Phoenix Division
No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, husband
and wife, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Comes Now the plaintiffs herein give notice that they, and each of them, appeal from the order denying their motion to vacate or set aside judgment herein; and from each and every other order entered in this cause.

Dated this 27th day of May, 1960.

GREIVE AND LAW,
/s/ By CHARLES LAW,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 13, 1960.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That We, William Carl Cunningham, et ux and Glenn A. Price, et ux, the plaintiffs above named, as Principal, and The Fidelity and Casualty Company of New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of Surety in the States of Arizona and Washington, as Surety, are held and firmly bound unto United States of America, the defendant above named in the just and full sum of Five Hundred Dollars (\$500.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of May, 1960.

The Condition of This Obligation Is Such, That Whereas, the above named United States of America, on the 8th day of October, 1959, in the above entitled action and court, recovered judgment against the plaintiffs above named for \$223.90 costs which have been paid; and

Whereas, the plaintiffs above named petitioned for reinstatement of their claims against United States of America by motion to vacate judgment and said motion was denied by order of the above entitled court on April 29, 1960; and

Whereas, the above named Principals have heretofore given notice of appeal from said order,

Now Therefore, if the said Principal William Carl Cunningham, et ux and Glenn A. Price, et ux, shall pay to United States of America, the defendant above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00), then this obligation to be void; otherwise to remain in full force and effect.

[Seal]

WILLIAM CARL CUNNINGHAM,

By RODERICK D. DIMOFF of
GREIVE & LAW,
Attorney in Fact.

GLENN A. PRICE,

By RODERICK D. DIMOFF of
GREIVE & LAW,
Attorney in Fact.

FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

/s/ EUGENE D. FOX,
Attorney.

The foregoing bond approved this day of.....,
19....

.....
Judge.

The Fidelity and Casualty Company of New York

GENERAL POWER OF ATTORNEY

Know All Men by These Presents, that the Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make constitute, and appoint

Eugene D. Fox of Seattle, Washington

its true and lawful attorney for it and in its name, place and stead to execute on behalf of the said Company, as surety, bonds, undertakings and contracts of suretyship to be given to

all obligees

provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

This Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of The Fidelity and Casualty Company of New York at a meeting duly called and held on the 16th day of October, 1957:

“Resolved, that the Chairman of the Board, the President, an Executive Vice President or any Vice President of the Company, be, and that each or any of them hereby is, authorized to execute Powers of Attorney qualifying the attorney named in the given Power of Attorney to execute in behalf of The Fidelity and Casualty Company of New York, bonds, undertakings and all contracts of suretyship; and that any Secretary or any Assistant Secretary be, and that each or any of

them hereby is, authorized to attest the execution of any such Power of Attorney, and to attach thereto the seal of the Company.

Further Resolved, that the signatures of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed and in the future with respect to any bond, undertaking or contract of suretyship to which it is attached."

In Witness Whereof The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its Vice Presidents and attested by one of its Secretaries this 31st day of March, 1959.

The Fidelity and Casualty Company
of New York,

[Seal] /s/ CARROLL R. YOUNG,
Vice-President.

Attest:

/s/ A. J. MILLER,
Secretary.

State of New York, County of New York—ss.

On this 31st day of March, 1959, before me personally came Carroll R. Young, to me known, who being by me duly sworn, did depose and say: that he resides in Berkeley Heights in the County of Union, State of New Jersey, at 23 Ridge Drive East; that he is a Vice-

President of The Fidelity and Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] /s/ ROBERT J. METTALIA,
Notary Public,

State of New York No. 41-2675700,
Qualified in Queens County,
Certificate Filed in New York County,
Term Expires March 30, 1961.

State of New York, County of New York—ss.

I, the undersigned, a Secretary of The Fidelity and Casualty Company of New York, a New York corporation, Do Hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney, is now in force.

Signed and sealed at the City of New York. Dated the 26th day of May, 1960.

[Seal] /s/ A. J. MILLER,
Secretary.

Bond 4315A.

[Endorsed]: Filed June 13, 1960.

[Letter head]

Registered

Air Mail

Mr. William H. Loveless, Clerk

United States District Court

District of Arizona

Phoenix, Arizona

Re: Civ-2962 Phx., Cunningham vs. U.S.A.

Civ-2963 Phx., Price vs. U.S.A.

Dear Sir:

Please file the following papers in our appeal:

1. Order dispensing pretrial conference, filed October 5, 1959.
2. Motion and Order dismissing Hash and Hash as counsel for plaintiffs, filed October 6, 1959.
3. Order of Dismissal, filed October 6, 1959.
4. Plaintiffs' Motion to Vacate Judgment, lodged December 28, 1959 and filed February 8, 1960.
5. Order denying Plaintiffs' Motion to Vacate Judgment, entered April 28, 1960.
6. Plaintiffs' Notice of Appeal, filed June 13, 1960.
7. Plaintiffs' Bond for Costs on Appeal, filed June 13, 1960.

Enclosed is a check for \$20.00, as down payment for transcript. We will send the rest upon receipt of the exact statement. Please file these.

Very truly yours,

GREIVE AND LAW,
/s/ By RODERICK D. DIMOFF.

RDD:eb

cc: U. S. Attorney General

[Endorsed]: Filed June 29, 1960.

In the United States District Court
for the District of Arizona

No. Civ-2962-Phx.

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. Civ-2963-Phx.

GLENN A. PRICE and JANE DOE PRICE, hus-
band and wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COUNTERDESIGNATION OF RECORD ON
APPEAL

Pursuant to the Federal Rules of Civil Procedure,
the defendant-appellee hereby designates for inclusion
in the record of appeal to the United States Court of
Appeals for the Ninth Circuit, taken by Notice of
Appeal filed June 13, 1960, the following: all of the
record, proceedings and evidence in this action.

/s/ JACK D. H. HAYS,
United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 7, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the Plaintiffs' time within which to file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, is hereby extended to and including August 6, 1960.

Dated this 25th day of July, 1960.

/s/ DAVE W. LING,

Judge,

United States District Court for
the District of Arizona.

[Endorsed]: Filed July 27, 1960.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in case No. 2962 Phoenix, William Carl Cunningham, et ux, Plaintiffs, vs. The United States of America, Defendant, and case No. Civ-2963 Phoenix, Glenn A. Price, et ux, Plaintiffs, vs. The United States of America, Defendant, on the docket of said court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing

thereon are the originals of said documents filed in said cases, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of minute entries constitute the record on appeal in said cases as designated and the same are as follows, to wit:

1. Plaintiffs' Complaint (Civ-2962 Phx.)
2. Plaintiffs' Amended Complaint (Civ-2962 Phx.)
3. Plaintiffs' Complaint (Civ-2963 Phx.)
4. Defendant's Answer (Civ-2962 Phx.)
5. Defendant's Answer (Civ-2963 Phx.)
6. Plaintiffs' Motion to Consolidate for trial (Civ-2962 Phx. and Civ-2963 Phx.)
7. Minute entry of January 19, 1959 (order setting and consolidating cases for trial, Civ-2962 Phx. and Civ-2963 Phx.)
8. Deposition of Thomas J. McIntyre (Civ-2962 Phx. and Civ-2963 Phx.)
9. Deposition of Ray Edward Ramaker (Civ-2962 Phx. and Civ-2963 Phx.)
10. Defendant's Request for Answers to Interrogatories (Civ-2962 Phx.)
11. Defendant's Request for Answers to Interrogatories (Civ-2963 Phx.)
12. Plaintiffs' Answer to Interrogatories (Civ-2963 Phx.)

13. Deposition of Bernard John Oswald (Civ-2963 Phx.)
14. Deposition of Dr. Forrest L. Flashman (Civ-2962 Phx. and Civ-2963 Phx.)
15. Deposition of Dr. R. E. Ramaker (Civ-2962 Phx. and Civ-2963 Phx.)
16. Plaintiffs' Answer to Interrogatories (Civ-2962 Phx.)
17. Minute entry of October 5, 1959 (pretrial proceedings, Civ-2962 Phx. and Civ-2963 Phx.)
18. Minute entry of October 6, 1959 (order of dismissal on trial date, Civ-2962 Phx. and Civ-2963 Phx.)
19. Defendant's Memorandum of Costs and Disbursements (Civ-2962 Phx.)
20. Defendant's Memorandum of Costs and Disbursements (Civ-2963 Phx.)
21. Plaintiffs' Motion to Vacate Judgment pursuant to Rule 60 (Civ-2962 Phx. and Civ-2963 Phx.)
22. Defendant's Memorandum in Opposition to Plaintiffs' Motion under Rule 20 (Civ-2962 Phx. and Civ-2963 Phx.)
23. Defendant's Motion for Security of Costs (Civ-2962 Phx. and Civ-2963 Phx.)
24. Defendant's Notice of hearing motions (Civ-2962 Phx. and Civ-2963 Phx.)
25. Defendant's Satisfaction of Memorandum of Costs (Civ-2962 Phx. and Civ-2963 Phx.)

26. Minute entry of February 8, 1960 (hearing on Motion to Vacate Judgment, Civ-2962 Phx. and Civ-2963 Phx.)
27. Plaintiffs' Memorandum of Authorities in Support of Motion to Vacate Judgment (Civ-2962 Phx. and Civ-2963 Phx.)
28. Supplemental Memorandum in Opposition to Plaintiffs' Motion under Rule 60 (Civ-2962 Phx. and Civ-2963 Phx.)
29. Minute entry of April 28, 1960 (Order Denying Motion to Vacate Judgment, Civ-2962 Phx. and Civ-2963 Phx.)
30. Plaintiffs' Notice of Appeal (Civ-2962 Phx. and Civ-2963 Phx.)
31. Plaintiffs' Bond for Costs on Appeal with Fidelity and Casualty Company (Civ-2962 Phx. and Civ-2963 Phx.)
32. Plaintiffs' Designation (Civ-2962 Phx. and Civ-2963 Phx.)
33. Defendant's Counterdesignation of Record on Appeal (Civ-2962 Phx. and Civ-2963 Phx.)
34. Order Extending Time for Transmitting Record on Appeal (Civ-2962 Phx. and Civ-2963 Phx.)

Witness my hand and the seal of said Court this
27th day of July, 1960.

[Seal] /s/ WM. H. LOVELESS,
 Clerk.

[Endorsed]: No. 17049. United States Court of Appeals for the Ninth Circuit. William Carl Cunningham, et ux., and Glenn A. Price, et ux., Appellants, vs. United States of America, Appellee. Transcript of Record. Upon appeal from the United States District Court for the District of Arizona.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17049

WILLIAM CARL CUNNINGHAM and VERA
MAE CUNNINGHAM, husband and wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

GLEN A. PRICE and JANE DOE PRICE, husband
and wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' STATEMENT OF POINTS

To: The clerk of the above entitled court:

To: The clerk of the United States District Court
for the District of Arizona, Phoenix Division:

To: Jack D. Hays, United States Attorney, attorney
for the Appellee:

Come Now the appellants and respectfully submit a
statement of the points on which they intend to rely on
appeal as follows, to-wit:

1. They claim error and abuse of discretion on the part of the District Judge in dismissing their case;

2. They claim error and abuse of discretion on the part of the District Judge in failing to grant their motions to vacate and set aside judgment previously entered, particularly in view of the fact that their affidavits and irrefutable record in their favor was never impeached;

3. They claim error and abuse of discretion on the part of the District Judge in denying their motions to vacate and set aside judgment previously entered in favor of the defendant-appellee.

GREIVE AND LAW,
attorneys,

/s/ By RODERICK D. DIMOFF,
Roderick D. Dimoff,
for the appellants.

4456 California Avenue,
Seattle 16, Washington,
Telephone: WEst 7-4111.

[Endorsed]: Filed Jan. 26, 1961. Frank H. Schmid,
Clerk.

No. 17,050 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

BAY COUNTIES TITLE GUARANTY Co. (formerly Bay Counties Escrow Co.), vs. COMMISSIONER OF INTERNAL REVENUE, 	<i>Petitioner,</i> <i>Respondent.</i>
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PETITIONER'S OPENING BRIEF.

PEART, BARATY & HASSARD,

JOSEPH S. ROGERS,

111 Sutter Street,
San Francisco 4, California,

KENNETH S. CAREY,

220 Bush Street,
San Francisco 4, California,

Attorneys for Petitioner.

FILED

DEC 21 1960

FRANK H. SCHMID, CLERK

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No. 17,050

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BAY COUNTIES TITLE GUARANTY Co. (formerly Bay Counties Escrow Co.), <i>Petitioner,</i>	}
vs.	
COMMISSIONER OF INTERNAL REVENUE, <i>Respondent.</i>	

PETITIONER'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Petitioner, BAY COUNTIES TITLE GUARANTY COMPANY, a California corporation, hereby petitions the Honorable United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court, Docket No. 63623, 34 T. C. #3.

This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954. Petitioner filed its federal income tax returns for the calendar years in question with the District Director of Internal Revenue, San Francisco. Jurisdiction is vested in the United States Court of Appeals for the

Ninth Circuit pursuant to Section 7482(b)(1) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE.

Petitioner is a California corporation which was incorporated July 3, 1946 and commenced business operations in September of 1946. Its principal place of business is San Francisco, California. Petitioner keeps its books and reports its income for federal income tax purposes on an accrual basis. The expenditures in question were cash disbursements (Tr. p. 26).

Petitioner is an underwritten title company as defined in Section 12402 of the Insurance Code of the State of California (Tr. p. 26). As such company it performs all services in connection with the transfer of real property. Its underwriter is Pacific Coast Title Insurance Company of Los Angeles, who has as a co-insurer Louisville Title Insurance Company of Louisville, Kentucky (Tr. p. 26). Petitioner performs the services usually performed by title insurance companies in the State of California; that is, it conducts examinations and searches of titles; it issues title insurance policies; it performs as an escrow company, supervising the closing of transactions involving transfers of real property (Tr. p. 26-7). Fees for its services are required by law to be filed with the office of the Insurance Commissioner of the State of California.

When petitioner commenced business in 1946, it set about to accumulate a title plant; that is, a series of records which reflect all transactions affecting title to real property in the City and County of San Francisco. As

of December 31, 1951, petitioner had established a typical title plant (Tr. p. 112 to p. 116). Petitioner's plant included tract maps of all of the real estate in the City and County of San Francisco by lot and block (petitioner uses the Assessor's lot and block system as the foundation for its plant). The lot books covered every lot in the City and County of San Francisco. In addition, petitioner had a set of general indices, tax assessor's reports back to 1938, a complete set of Edward's Abstracts back to 1908 (Edward's Abstracts contains daily reports of all recordings affecting titles to real property such as transfers, bankruptcies, probate proceedings, litigation, etc.). Petitioner's title plant had been acquired and accumulated during the years 1947 to 1951 (Tr. pp. 27-28). A typical title plant is augmented daily in the ordinary course of business (Tr. p. 112). A great multitude of transactions occur every day in a city the size of San Francisco which affect the title to real property. Such transactions include divorce, bankruptcies, litigation, deaths, transfers of title to property, assessment of taxes, filing of federal tax liens, as well as judgments of various kinds. Petitioner, as part of its daily routine, acquires copies of all recorded and filed transactions and documents affecting title to real property (Tr. p. 112).

As hereinabove stated, petitioner's real property plant is founded on the system used by the County Tax Assessor. All items of information concerning the title to real property are segregated to the various indices referring to the parcels affected. In addition to the basic data accumulated by petitioner in the years 1947 to 1951 and daily since then, petitioner uses the records of the City and County,

United States District Court and other relevant records as a basis for carrying on business (Tr. p. 112). For all practical purposes, as of December 31, 1951, petitioner's title plant contained records of every parcel of real property in the City and County of San Francisco for which records existed (Tr. p. 112-3). Also, its records showed every recorded transaction affecting real property in the City and County of San Francisco for a period in excess of five (5) years (Tr. p. 112-4). At the end of 1951, the book value of petitioner's plant was \$25,000.00. Its capital, consisting of common stock, was 2,500 shares of stock, having a total par value of \$25,000.00.

When petitioner began business in 1946 it had four employees. In 1952 it had 34 employees, including 13 title search people, two examiners and three in the general indices section (Tr. p. 118).

There is no statutory requirement relating to the method or means by which those engaged in writing title insurance shall assure themselves of the correctness of the record state of the title; however, it is customary for title companies to search the record state of the title through all relevant records (Tr. p. 29-30). In making such title search, it is common to make use of any relevant item of information tending to show the current state of the title. Such information when possible, includes title reports and insurance policies previously prepared on the premises or old title reports or insurance policies issued by another company. The use made of (i. e. the weight given to) preliminary reports or insurance policies of other companies depends upon the estimate of the title examiner of the validity of the conclusions reached in said

report or policies. All title insurance companies use existing preliminary reports as an additional source of title information. Such practice in many cases eliminates the necessity of examining the title prior to the date of the preliminary report (Tr. p. 120-1).

In San Francisco there are four old and well-established title companies which issue policies of title insurance—the California Pacific Title Insurance Company (now a division of Title Insurance & Trust Company of Los Angeles), Western Title Insurance and Guaranty Company, Northern Counties Title Insurance Company, and City Title Insurance Company (Tr. p. 30). Among them, there is an understanding and arrangement for the reciprocal exchange of information concerning real estate titles which each has in its files (Tr. p. 30-1). Thus, one company making a search of title to a piece of real estate with respect to which another previously had made an examination may make use of the existing report made by the other company, as a starter, or as additional title information (Tr. p. 30-1).

The petitioner is not admitted to participation in the reciprocal exchange arrangements of the four above named title companies. The petitioner and Pacific Coast Title compete with the above companies (Tr. p. 31).

Petitioner has followed the practice since it began business of obtaining copies of preliminary (“starter”) reports and of old title policies from real estate concerns, real estate brokers, lending institutions, and others. It followed that practice before and during the taxable years. It has made payments for them or sometimes it has obtained them free of charge (Tr. p. 31).

Several real estate brokers in the San Francisco area have frequently furnished the petitioner with copies, from their files, of preliminary reports and of title policies on various pieces of real estate involved in transactions which they have handled in the past and in which transactions the petitioner did not participate, for which they have received cash payments from the petitioner. Often copies of such reports or old title policies on a particular piece of property have been furnished upon request of petitioner, and at times petitioner has made use of them in its current search on a particular property. At other times, petitioner has put copies of preliminary reports or of old title policies in its files to serve as a starter in a future search (Tr. p. 32), in order to reduce the expense incurred in preparing a "starter" search.

In most instances, real estate brokers do not charge any stated fee or exact amount for furnishing a copy of a preliminary report or old title policy to the petitioner, and petitioner has followed the practice of making payments periodically to real estate brokers of amounts which it determined represented the value of the information furnished. Such payments, at times, have been made monthly and they have been in varying amounts ranging from \$25, \$60, \$90, \$100, or more (Tr. p. 33).

In 1952, as an example, petitioner had an arrangement with one real estate firm in San Francisco whereby it could look through its files and locate copies of preliminary reports or old title policies which it obtained at no cost. In another instance, a real estate broker having his own business regularly provided petitioner with

copies of preliminary reports or old title policies from his files and he periodically received lump sum payments from petitioner for such general accommodation but not for individual copies of report or policies. Such payments always were made in cash (Tr. p. 33).

During the taxable years, petitioner made cash payments to real estate brokers in the total amounts set forth below:

<u>Year</u>	<u>Amount</u>
1952	\$6,896
1953	8,581
1954	7,534

The following schedule shows the amounts of such cash payments by months:

<u>Month</u>	<u>1952</u>	<u>1953</u>	<u>1954</u>
Jan.	\$ 386	\$ 736	\$ -0-
Feb.	505	521	556
Mar.	484	532	467
Apr.	482	729	812
May	503	651	470
June	575	644	480
July	579	687	645
Aug.	671	715	674
Sept.	530	778	589
Oct.	661	704	693
Nov.	804	768	700
Dec.	716	1116	1448
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	\$6896	\$8581	\$7534

(Tr. p. 34)

The names of the real estate brokers and the payments received by them in 1952, 1953 and 1954 were not reflected in the books and records of petitioner, but were in a personal record belonging to petitioner's president, Rolls. The payments to the real estate brokers were made by Rolls personally in cash. Checks of the petitioner were made payable to cash and cash was made available in this way to make payments to real estate brokers. The accounting records showed the cash withdrawals, and the amounts of the payments to real estate brokers were charged on the books to an expense account such as advertising expense (Tr. p. 34-5). Such method was suggested by a Revenue Agent named J. Kewman upon examining petitioner's records in 1952 (Tr. p. 151).

Neither the petitioner nor its president, Rolls, maintained any record at any time, including the taxable years, showing the specific preliminary title reports or copies of old title policies on particular pieces of real estate which the petitioner had purchased during a year from any real estate broker or any other source (Tr. p. 35-6). Petitioner did not keep an exact record of how many preliminary reports or old title policies on various pieces of real estate it had purchased in each of the taxable years (Tr. p. 36).

Petitioner had a system for filing the copies of preliminary title reports and old title policies on various pieces of property so as to make such information easily and readily available at any time for daily use.

During the years 1952-54, petitioner acquired many preliminary title reports or copies of old title policies; it paid for some of these documents; and it filed all of those

acquired in its plant records (Tr. p. 37). The bulk of the preliminary title reports and title policies which petitioner purchased during the taxable years did not relate to any particular searches and examinations of titles which it made in the taxable years for the issuance of title insurance policies (Tr. p. 36-8). However, such information had to be available at all times for use in its daily operations.

Prior to 1952, petitioner capitalized in its accounting records all payments for preliminary title reports, all old title policies and all other expenses with respect to salaries and costs related to title searchers and daily expense of plant maintenance (Tr. p. 184-5). However, this capitalization was made with the full realization that these expenditures were deductible. Taxpayer had business reasons for not taking the allowable deductions for income tax purposes (Tr. p. 183-4). Petitioner, for the first time, in 1952, 1953 and 1954 charged all payments for such preliminary title reports, old title policies and all other expenses related to title searchers and daily expense of plant maintenance to current operating expenses and took deductions therefor in its income tax returns at the suggestion of Revenue Agent Kewman and because it had accomplished its business reasons for capitalizing such expenses. Respondent disallowed the entire amounts of the deductions for the purchase of preliminary reports and old title policies, \$6,896 in 1952, \$8,581 in 1953, and \$7,534 in 1954 (Tr. p. 19).

It was less expensive for petitioner to purchase these reports than it would have been to pay the wages and

salaries necessary to have it own employees provide this information (Tr. p. 187-8). Such wages and salaries unquestionably would have been deductible.

STATEMENT OF QUESTION.

Reduced to its lowest terms, the question presented to this Court is:

Is the cost of acquiring additional information concerning the status of title to real property, which information is in the form of title insurance policies and/or preliminary title reports of other companies, an ordinary and necessary business expense deductible under section 23(a)(1)(A) of the Internal Revenue Code of 1939 and Section 162 of the Internal Revenue Code of 1954, or is such cost a non-deductible capital expenditure?

The error complained of is the opinion and decision of the Tax Court (Tr. pp. 24-46) holding such cost to be a non-deductible capital expenditure.

SUMMARY OF ARGUMENT.

Petitioner contends:

I. That the cost of such reports is an ordinary and necessary business expense deductible under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 and Section 162 of the Internal Revenue Code of 1954.

(A) The Tax Court erred in determining that the old preliminary title reports and old title policies constituted additions and betterments to appellant's title plant, and

the expenditure for them was a non-deductible capital expense.

(B) The Tax Court erred in determining that the expenditures were not current maintenance expenses within the category of ordinary and necessary business expenses.

II. The information obtained from such reports is information currently used to maintain petitioner's title plant in an up to date running order.

(A) The Tax Court erred in determining that the preliminary title reports and old title policies purchased by the appellant in each taxable year had a useful life beyond the year of purchase which extended until such years as appellant might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them.

(B) The Tax Court erred in determining that the future time of use in appellant's business was problematic and indefinite depending upon when, as and if the appellant might be called upon to make abstracts of title to the same pieces of property.

**I. THE EXPENDITURES WERE ORDINARY AND NECESSARY
IN PURSUANCE OF PETITIONER'S BUSINESS.**

Section 23(a)(1) of the Internal Revenue Code of 1939 and Section 162 of the Internal Revenue Code of 1954 provide that there shall be allowed as deductions all "Ordinary and necessary expenses incurred or paid during the taxable year in carrying on a . . . business . . ."

It has never been claimed that the expenditures in question had no connection with petitioner's business. Nor in the face of the record could such a claim be made. It was stipulated that the expenditures in question were actually "paid" during the taxable years in question. Therefore, if the expenditures were "ordinary and necessary" they fell within the statutory definition and are deductible.

An expense is said to be ordinary if a "hard-headed businessman would have incurred it under like circumstances." (Mertens, Federal Income Tax, Ch. 25, P. 25). This is best illustrated by the Supreme Court's characterization of payments made reflecting an industrywide practice as being "ordinary." (*Lilly v. Commissioner*, 343 U. S. 90).

Regulations 111, Sec. 29.23(a)-15 in part provides: "Expenses to be deductible under Section 23(a)(2) must be 'ordinary and necessary'; which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to . . ." the business of the taxpayer. In the case at bar it is uncontradicted that *all* title insurance companies and title companies procure other companies, starters whenever possible. If they do not have a reciprocal exchange agreement, such as that between the so-called big four in San Francisco, they purchase or obtain starters from whatever source available.

The big four in the City and County of San Francisco, to wit: California Pacific Title Insurance Company, City Title Insurance Company, Western Title Insurance and Guaranty Company and Northern Counties Title In-

insurance Company, have a reciprocal arrangement whereby title information in all forms is exchanged between said four companies.

The purchase of title reports and/or title insurance policies is a matter of sound business economy, practice and efficiency on the part of petitioner and all other companies and actually decreases the cost of operation. Petitioner, in order to carry out its business purpose, must be able at any time to furnish a report of the state of the title of *any* parcel of real property in the City and County of San Francisco. As a matter of practical competition this report must be available within a short time; must be accurate, and it must be prepared at a reasonable cost. To fulfill these goals, petitioner must maintain title information that will permit of efficient service at a reasonable cost. Title insurance companies could issue insurance policies based upon the record title on any given day without any further search. However, the risk of loss attendant upon such a practice has persuaded those in the industry that it is wise to make certain that the record title is without cloud or to except from the policy of insurance those clouds which appear upon a search of the record. In the City and County of San Francisco, this could mean a search back to the time of the fire in 1906. Such a search would be extremely expensive. For that reason, any practice which can cut down the length of time required to make a search necessarily cuts down the cost of determining the status of title. The big four title insurance companies in the City and County of San Francisco have obtained a considerable competitive advantage with their reciprocal arrangement for the ex-

change of title information, plus a letter of indemnity upon which each might rely. In order to be able to compete, it is necessary that petitioner and all title companies similarly situated purchase or obtain preliminary reports or title insurance policies which provide the purchaser with a fund of title information similar to that which the big four derive from the reciprocal exchange agreement.

Most title information is subject to interpretation and evaluation. No title plant is therefore ever "complete" or "perfect" or "current." Elements involving human errors or omissions affect the current status of a plant in its daily operations. If title companies have in their possession or available to them title reports from other companies which may contain a diversity of opinions, they can evaluate all of the information including the diverse opinions and render their own opinion and issue their own report.

An expenditure is said to be "necessary" when it is appropriate or helpful to provide the desired result.

Mr. Chief Justice Marshall in *McCulloch v. Maryland* (1819) 4 Wheat., 316 at 413 said:

"If reference be had to its use . . . we find that it frequently imparts to more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end."

In *Welch v. Helvering* (1933) 290 U. S. 111, Mr. Justice Cardozo, construing "necessary" as it is used in the Code, said:

“We may assume that the payments . . . were necessary for the development of the petitioner’s business, at least in the sense that they were appropriate and helpful . . . (petitioner) certainly thought they were, and *we should be slow to override his judgment.*” (emphasis added)

- A. The Tax Court erred in determining that the preliminary title reports and old title policies purchased by the appellant in each of the taxable years in question had a useful life beyond the year of purchase which extended until such years as appellant might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them.**

O. D. 1018, 5 C.B. 119 (1921) provides:

“Title abstract companies incur relatively large and continuous expenditures in keeping their plants up to date, such as the expense of adding and incorporating in the plant records that are being made daily in the various courts and in the Recorder’s office.

“These records which are added to and incorporated in the plant for the purpose of keeping it in up to date running order and preventing depreciation are in the nature of ordinary and necessary repairs. The expenses, therefore, incurred in making such records are current expenses, and as such are deductible for the year in which incurred and paid or accrued.

“Since a title plant is not an asset of a nature which gradually approaches a point where its usefulness is exhausted, but is an asset of a more or less permanent character, it is not a proper subject of a depreciation allowance.”

Petitioner's Exhibits 2 and 3 before the Tax Court illustrate the use of these starters in the typical transaction. If in either of these matters there had been no starter the searcher would have had to go back in the records to either the date of the filing of a subdivision map or to 1906 (Tr. p. 121-2). Petitioner's records show that in a significant number of cases petitioner used starters as illustrated in petitioner's Exhibits 2 and 3.

The starters are incorporated in petitioner's title plant in the same manner as the daily filings in the County Recorder or County Clerk's office, thus keeping the plant in an up to date running order. This fund of title information is readily available to petitioner whenever a customer desires a preliminary report.

Whenever title is searched to a given date and evaluated, the title plant insofar as it affects that parcel of real property prior to that date is of no further value. Use of a starter therefore has the effect of replacing all title information prior to its date. Any increase in value occasioned by use of the report is offset by the decrease in value and replacement of prior information.

These starters are substantially the same as the title information available daily in all governmental offices. As pointed out in O. D. 1018, *supra*, expenditures for these items of information have been recognized by the Commissioner of Internal Revenue since 1921 as being ordinary and necessary and hence deductible expenditures. Like the daily recordings and filings in the various government offices, petitioner might not use some of these preliminary reports and title insurance policies for several years but in order to be efficient and to be able at any

time to determine the state of title of any parcel of real property in the City and County of San Francisco within a short period of time and at a reasonable cost, it is necessary for petitioner to obtain title information wherever and whenever it can. These preliminary reports and/or insurance policies are simply title information upon which petitioner in part bases its opinion of title. They are no more additions to petitioner's title plant than are the daily recordings or filings in the various government offices.

Petitioner could obtain starter reports by the more expensive method of hiring title searchers to prepare these reports. It has never been contended by respondent, nor is it contended in this case, that the expense of a title searcher is to be regarded as a capital expense. The function of these title reports and policies is much the same as that of the title searcher. If one expenditure is to be regarded as a deductible expense, so also must the other. It is highly relevant to this issue that petitioner has utilized the least expensive method taxwise and otherwise.

A recent example of the materiality of this fact is shown in *General Motors Corporation v. The United States* in the United States Court of Claims (60-2 USTC, paragraph 9762). In that case General Motors had contested a dividend privilege tax levied by the State of Wisconsin. In 1940 the Supreme Court of the United States held the tax statute constitutional. Thereafter, General Motors accrued on its books the taxes due the State of Wisconsin. Notwithstanding the fact that the statute levied the tax on the stockholders, not the corporation, it was conceded that the cost of allocating the tax to the individual share-

holders on a quarterly basis would have cost the corporation more than the tax did. The corporation argued that it should be permitted to deduct the tax under §23(a). In response to that argument, the Court of Claims said:

“It was economically wise for the plaintiff to absorb the cost of this tax rather than to pay several times the amount of the tax to get it computed and recorded accurately for each shareholder. See *Baltimore Steam Packet Co. v. United States*, C.C., 180 Fed. Supp. 347 (decided January 20, 1960) [60-1 USTC, paragraph 9231]; *Canton Cotton Mills v. United States*, 119 C.C. 24, 94 Fed. Supp. 561 (1951) [51-1 USTC, paragraph 9131]. It may be observed that if the plaintiff had undergone the expense of subtracting the tax from the shareholders’ dividends that expense would have been a ‘ordinary and necessary’ and therefore deductible expense and the Federal government would have borne a larger share of it because it would have reduced the plaintiff’s income and excess profits taxes.” (60-2 USTC, page 78,130)

II. THE INFORMATION OBTAINED FROM SUCH REPORTS IS INFORMATION CURRENTLY USED TO MAINTAIN PETITIONER'S TITLE PLANT IN AN UP TO DATE RUNNING ORDER.

A. The Tax Court erred in determining that the preliminary title reports and old title policies purchased by the appellant in each taxable year had a useful life beyond the year of purchase which extended until such years as appellant might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them.

While it is true that some of the reports purchased in the years in question were not used in evaluating a particular title the year of purchase, it is not true that petitioner was purchasing an asset having a useful life in excess of one year. The reports are immediately incorporated in the plant for immediate use.

The starters are incorporated in petitioner's title plant in the same manner as the daily filings and recordations in the County Recorder and County Clerk's office. The fund of title information is immediately available to petitioner whenever a customer desires a preliminary report.

Further, even conceding *arguendo* that these assets had a useful life in excess of one year or that they would be used in future years does not negate their deductibility. There are many analogous situations wherein such expenditures are held deductible. For example—advertising is a deductible expense even though its value is not confined to the years of expenditure. Thus, in *Consolidated Apparel Co.* (1952) 17 T. C. 1570, taxpayer, on the accrual basis, pledged \$7,500.00 to a merchant's association for advertising. One-half of this was paid by tax-

payer in 1946 and he sought to deduct the sum paid even though the advertising was to be done over a period of five years.

The Commissioner disallowed a portion of the deduction on the ground that the expenditure should be capitalized and deducted pro-rata over the life of the advertising contract. The Tax Court in rejecting the Commissioner's contention said:

“There is no statutory requirement or authorization for such an allocation. Reasonable costs of advertising are generally allowed as business expenses. They are deductible under Section 23(a) in the year when paid, or if the taxpayer reports an accrual basis, in the year when the liability is incurred. Petitioner made its return on an accrual basis. It accrued in its books and deducted in its 1946 return . . . the amount paid in that year. That amount at least was properly accrued and deducted as an expense of that year. Section 43, Internal Revenue Code, to which respondent refers in his brief, *does not authorize the spreading of depreciation deductions in respect of the cost of advertising or the acquisition of any non-taxable capital asset.*” (Emphasis added)

In *E. H. Sheldon & Company*, 19 T. C. 481, taxpayer designed, manufactured and installed laboratory equipment. Periodically it issued a catalogue which was intended to be a reference book of information on available equipment. These catalogues were used in practically every sale made by taxpayer's salesmen, but no sales were made by use of the catalogue alone. The estimated useful life of the catalogue was five years. The taxpayer contended that the expense of the catalogue was a current expense.

Commissioner contended it was a capital expense to be amortized over the useful life. The Tax Court held for the Commissioner, notwithstanding petitioner contended that it was an expense because "the exact period of usefulness . . . is not determinable and their value to petitioner did not diminish with use."

On appeal to the Sixth Circuit the decision of the Tax Court was reversed (214 F. 2d 655 (1954)). Analogizing this case to the payment of advertising, the Court of Appeals said:

"The fact that an expenditure produces something that has a useful life extending beyond the taxable year is clearly not the controlling test." (45 A.F.T.R. 659). Citing *Collingwood*, 20 T.C. 937; *Perkins Bros. v. Commissioner*, 78 Fed. 2d 152; *New Pittsburgh Coal Company v. Commissioner*, 200 F. 2d 146.

Further, "the rule also appears well settled that such an expense cannot be capitalized by the taxpayer in the absence of evidence showing with reasonable certainty the benefits resulting in later years from the expenditure."

So also in this case the exact period of usefulness is not determinable.

In *Collingwood*, 20 TC 937 (1953) the taxpayer terraced farm lands. This was done between crops, a few portions of the land at a time. Notwithstanding the useful life of these terraces extended beyond the year of construction, the Tax Court held that these were deductible as expenses.

Not only petitioner, but all title companies, will be placed in an anomalous position if this Honorable Court

affirms the judgment of the Tax Court. On the one hand the costs of acquiring such title information will not be deductible as an ordinary and necessary business expense. On the other hand, O. D. 1018, *supra*, has long been held by the Commissioner to bar deduction of such items by way of an allowance for depreciation. Thus, this business cost which is held to be neither fish nor fowl becomes a non-recoverable capital cost.

From what has been stated above in this brief, it is patent that:

- B. The Tax Court erred in determining that the future time of use in appellant's business was problematic and indefinite depending upon when, as and if the appellant might be called upon to make abstracts of title to the same pieces of property.**

This holding of the Tax Court is demonstrably spurious. It is obvious that the reports or policies are not the sole source of title information. Those reports must be continuously augmented by obtaining the daily record from all governmental records and filings. Without such augmentation which keeps a title plant in up-to-date running order, the reports or policies would be valueless. Suppose that an industrial plant maintained its own fire fighting or police organization. Would the cost of maintaining such organizations be non-deductible simply because the taxpayer could not show that it had a fire or a security problem in the taxable year?

CONCLUSION.

The expenditures in question, like those of advertising, maintaining safety organizations, etc. is one required by petitioner's business. Petitioner could no more afford as a matter of generally accepted business practice to be without an adequate title plant than a mercantile business without advertising or any business without protection from loss by fire or theft. The test is not actual use of these starters in the years in question, but whether in such years these were ordinary and necessary in the operation of taxpayer's business in maintaining its title plant in up-to-date running order. From the foregoing, it is patent that the decision of the Tax Court should be reversed.

Dated, San Francisco, California,
December 14, 1960.

Respectfully submitted,

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No. 17050

**In the United States Court of Appeals
for the Ninth Circuit**

**BAY COUNTIES TITLE GUARANTY CO. (FORMERLY
BAY COUNTIES ESCROW CO.), PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision
of the Tax Court of the United States**

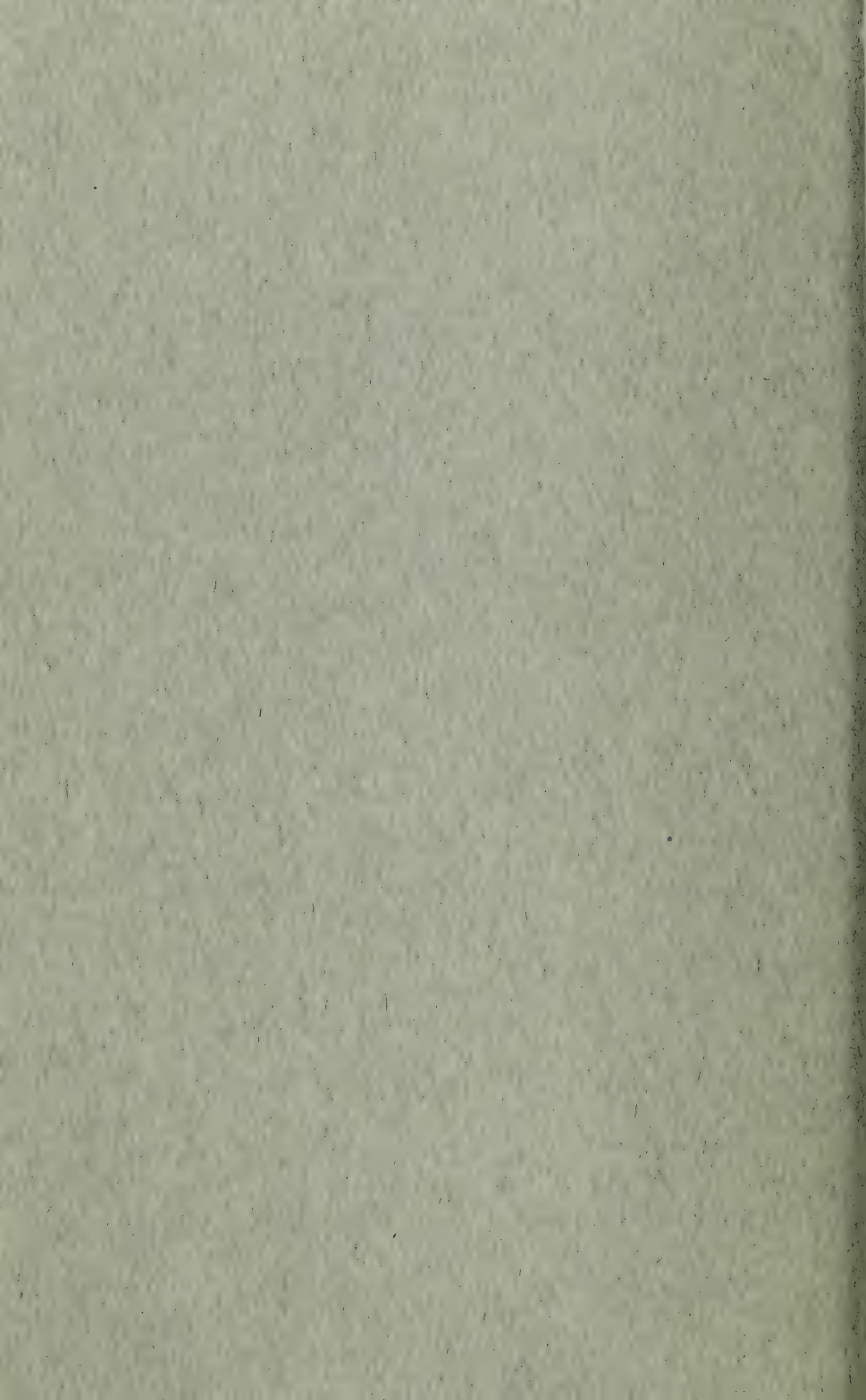
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 17050

**BAY COUNTIES TITLE GUARANTY CO. (FORMERLY
BAY COUNTIES ESCROW CO.), PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision
of the Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 24-46) are reported at 34 T. C. 29.

JURISDICTION

This appeal involves income taxes for the calendar years 1952, 1953 and 1954. The Commissioner's notice of deficiency (R. 16-20) was mailed to the taxpayer on or about May 7, 1956 (R. 6, 16). Within 90 days thereafter, and on August 2, 1956, the taxpayer filed its petition with the Tax Court for re-determination under Section 272 of the Internal Rev-

enue Code of 1939 and Section 6213 of the Internal Revenue Code of 1954. (R. 3, 6-20.) The decision of the Tax Court that there is a deficiency in income tax for each of the taxable years 1952, 1953 and 1954 in the amounts of \$2,068.80, \$2,574.30 and \$1,924.71, respectively, was entered on April 12, 1960. (R. 46-47.) The case is brought to this Court by petition for review filed July 5, 1960. (R. 47-50.) Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly sustained the Commissioner's determination that the amounts paid by the taxpayer, a title company, for starter reports and old policies on real estate titles should be treated as nondeductible capital expenditures rather than as ordinary and necessary business expenses which are deductible currently.

2. Alternatively, whether the taxpayer changed its method of accounting so as to require the advance consent of the Commissioner.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The material facts found by the Tax Court (R. 26-38) may be summarized as follows:

The taxpayer is a California corporation which keeps its books and reports its income on an accrual

basis. Taxpayer is an agent of the Pacific Coast Title Insurance Company of Los Angeles, hereinafter called "Pacific Title." Pacific Title is engaged in the title insurance business, being an underwriting company which issues policies of insurance on titles to real estate. (R. 26.)

The taxpayer conducts examinations and searches of title and then requests Pacific Title to issue insurance policies based upon such examinations. Taxpayer sells title insurance policies of Pacific Title and is the exclusive agent of Pacific Title in San Francisco County. Taxpayer is also an escrow company and attends to the closing of real estate transactions. It receives fees for its services in such matters. (R. 27.)

Taxpayer's title plant was acquired and accumulated during the five years 1947-1951. This plant includes maps of parcels and lots of real estate in San Francisco County; books of abstracts; tax assessor's ownership records; a complete set of Edwards Abstracts going back to 1908; also various records of searches and miscellaneous data. In carrying on its business, taxpayer uses its own basic records and, in addition, the city and county recorder's office records. (R. 27-28.)

Prior to 1952, the taxpayer capitalized all of its expenditures for real estate records; and by the end of 1951, the total cost of taxpayer's plant amounted to \$25,000. In 1952, taxpayer had 34 employees, including 13 searchers and two examiners; the work of the searcher being to search and assemble material relating to titles and that of the examiner being to

write an abstract report and opinion. In general, before a policy of title insurance will be issued, it is necessary to make a complete search of the chain of title so as to determine whether a buyer will obtain a clear title. (R. 28-29.)

It is common for searchers and examiners to make use of previously prepared, or old, title reports as a starter, and then to bring the search up to date. If a starter report is available, it is unnecessary to make a complete search back to the earliest records; and frequently a starter report provides a title record up to a few years prior to the date of examination. A title examiner seldom retraces the search covered by a starter report; and these starter reports save time and expense in examining titles to real estate. (R. 29-30.)

There are four well-established title companies in San Francisco, and they have arrangements for reciprocal exchanges of information and data including starter reports. The taxpayer and Pacific Title are competitors of these four companies and are not entitled to participate in their reciprocal arrangements. (R. 30-31.)

Since taxpayer began business, it has followed the practice of obtaining copies of starter reports and old title policies from real estate concerns, real estate brokers, lending institutions and others. Sometimes taxpayer has made payments for such reports and policies, and sometimes it has obtained them free of charge. In most instances, payment is not made on the basis of individual copies, and lump sums are periodically paid for general accommodations. Pay-

ments are always made in cash. In this connection, payments of \$6,896, \$8,581 and \$7,534 were made to real estate brokers in the taxable years 1952, 1953 and 1954, respectively. Those amounts were deducted as advertising expenses in taxpayer's income tax returns for those years. Neither the taxpayer nor its president, Rolls, who personally made the above payments, maintained any record showing the specific reports or policies to which the payments related. (R. 31-36.)

The bulk of the preliminary title reports and title policies which taxpayer purchased during the taxable years did not relate to any searches and examinations which it made in those years. Therefore, such documents were filed and indexed as a part of taxpayer's records for such future use, if any, as might develop. (R. 37.)

As above indicated, prior to 1952, taxpayer capitalized all payments for preliminary reports and old title policies; and for the first time, in 1952, 1953 and 1954, such payments were charged to current operating expenses and deducted in taxpayer's income returns. The Commissioner disallowed the entire amount of the deductions, \$6,896 in 1952, \$8,581 in 1953 and \$7,534 in 1954. (R. 37.)

The Tax Court in sustaining the Commissioner specifically found and held (R. 37-38, 43-44) that the preliminary reports and old policies purchased by taxpayer in each taxable year had a useful life beyond the year of purchase, and the future time of use in taxpayer's business was problematic and indefinite depending upon when, as, and if taxpayer

might be called upon to make abstracts to the same pieces of property; in the circumstances, the reports and policies in question constituted additions and betterments to taxpayer's title plant, and the expenditures for them were nondeductible capital expenses and not ordinary and necessary business expenses.

SUMMARY OF ARGUMENT

I

The Tax Court made no error in holding that the amounts paid by taxpayer for starter reports and old policies of insurance on real estate titles were nondeductible capital expenditures and not ordinary and necessary expenses of doing business. The expenditures were made for items which constituted valuable additions to taxpayer's title plant and they were precisely within the definition of capital expenditures contained in long-standing Treasury Regulations to the effect that expenditures for items of plant, equipment, etc. which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account. The instant expenditures are different from amounts spent to obtain daily records which are treated as expense items since they are made currently to keep the plant in normal working order and are similar to incidental repairs. It is not always easy to draw the line between capital expenditures and expense items, but the Tax Court has correctly drawn the line in the instant case. This Court has held that it will rarely disturb the determination of

the trial court in a case of this character (*United States v. Times-Mirror Co.*, 231 F. 2d 876); and we submit that there is no adequate basis for disturbing the decision of the Tax Court here. It is not of critical importance whether depreciation or obsolescence deductions may be taken with respect to the additions to taxpayer's title plant, for the true test of a capital expenditure is the nature of the expenditure in and of itself. It is obvious that an expenditure for land would be capital in character and not a deductible item of expense even though no depreciation deductions could be taken with respect to the land. The decision of the Tax Court herein is in accord with the law and the Regulations, sustained by the record and should therefore be upheld by this Court.

II

In any event, taxpayer would be required to obtain the Commissioner's consent in order to treat the instant items as deductible business expenses, since it capitalized all such items in prior years. The applicable Regulations (Treasury Regulations 118, Section 39.41-2) provide that a taxpayer can not change its accounting method for tax purposes without the advance consent of the Commissioner; and the term "accounting method" is broad enough to embrace not only over-all methods such as the cash and accrual methods, but also the accounting treatment of items of income or deductions. Here the taxpayer is attempting to make a material change in its accounting method without the Commissioner's consent, and we submit that this can not properly be done.

ARGUMENT

I

**The Amounts Paid by Taxpayer for the Starter Reports
Constitute Capital Expenditures and Not Business
Expenses**

In determining the deficiency herein, the Commissioner held (R. 18-19) (1) that the payments in question were in fact rebates of escrow fees made in violation of California law and (2) in the alternative the payments were capital expenditures which could not properly be expensed. In his Tax Court brief, the Commissioner withdrew his first contention and stood on his alternative contention plus a further point that in any event taxpayer could not change its method of accounting without the advance consent of the Commissioner. As above indicated, the Tax Court upheld the determination that the payments were capital expenditures (R. 43) and in view of that disposition the Tax Court did not need to pass upon the further contention that the taxpayer sought to change its method of accounting without first obtaining the consent of the Commissioner. (R. 46.)

We will adhere to the position of the Commissioner as taken in his Tax Court brief; and we submit that the court below made no error in sustaining his determination that the expenditures in question were capital expenditures and not ordinary and necessary expenses of doing business. It has long been settled that expenditures made during the year should be properly classified as between capital and expense; and expenditures for items of plant, equipment, etc.

which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account. Treasury Regulations 118, Section 39.41-3 (Appendix, *infra*).¹ And see also *Crocker First Nat. Bank v. Commissioner*, 59 F. 2d 37 (C. A. 9th); *Schwabacher v. Commissioner*, 132 F. 2d 516 (C. A. 9th); *A. Giurlani & Bro. v. Commissioner*, 119 F. 2d 852, 857-858 (C. A. 9th); *Parkersburg Iron & Steel Co. v. Burnet*, 48 F. 2d 163 (C. A. 4th); *Russell Box Co. v. Commissioner*, 208 F. 2d 452 (C. A. 1st); *P. Dougherty Co. v. Commissioner*, 159 F. 2d 269 (C. A. 4th), certiorari denied, 331 U. S. 838; *Mt. Morris Drive-In Theatre Co. v. Commissioner*, 25 T. C. 272, affirmed, 238 F. 2d 85 (C. A. 6th); *Stoeltzing v. Commissioner*, 266 F. 2d 374 (C. A. 3d); *Denver & Rio Grande Western Railroad Co. v. Commissioner*, 279 F. 2d 368 (C. A. 10th); 4 Mertens, Law of Federal Income Taxation (1954 ed.), Section 25.20; cf. *United States v. Times-Mirror Co.*, 231 F. 2d 876 (C. A. 9th); *W. B. Harbeson Lumber Co. v. Commissioner*, 24 B.T.A. 542.

The Commissioner's determination is presumptively correct and the taxpayer has the burden of overcoming the presumption. *Welch v. Helvering*, 290 U. S. 111, 115; *RKO Theatres, Inc. v. United States*, 163 F. Supp. 598 (C. Cls.). The basic question is largely

¹ The relevant provisions of Sections 23(a)(1)(A) and 24(a) of the Internal Revenue Code of 1939 and Sections 39.23(a), 39.24(a) and 39.41-3 of Treasury Regulations 118 are set out in the Appendix, *infra*; see also Sections 162(a) and 263(a) of the Internal Revenue Code of 1954 and Sections 1.162-1, 1.162-4 and 1.263(a) of the Treasury Regulations on Income Taxes (1954 Code).

on of fact and the finding of the trial court will not be reversed in the absence of clear error. *United States v. Times-Mirror Co.*, *supra*; *P. Dougherty Co. v. Commissioner*, *supra*. There was no clear error in the instant case; and quite to the contrary the decision appears to be correct and amply supported by the record.

In this connection it will be noted that for the entire period from the date of taxpayer's incorporation (1946) until 1952 (the first taxable year here involved) all expenditures of the instant type were capitalized and no deductions were taken in taxpayer's income tax returns. In 1952 taxpayer began to treat such payments as expense items and took deductions in its income tax returns for the first time. (R. 37, 114-115.) Taxpayer did not obtain the consent of the Commissioner before making this change in its accounting procedures, and this matter will be more fully discussed in the next section of this brief. That point will become material only if this Court should disagree with the Tax Court and ourselves as to the payments being capital expenditures which cannot properly be deducted as business expenses.

In the instant case, the Tax Court after carefully considering the complete record concluded (R. 44) that "it is clear beyond any doubt that the starter reports have an economic life extending beyond the year of purchase and that they represented additions and supplements to the plant which increased its value." It has long been recognized that expenditures of this character should be charged to the capital account; and they are to be distinguished from ex-

penditures of a recurring nature where the benefit derived from the payment is realized and exhausted within the taxable year. O.D. 1018, 5 Cum. Bull. 119 (1921); O.D. 1049, 5 Cum. Bull. 175 (1921); I.T. 1775, II-2 Cum. Bull. 145 (1923); *Record Abstract Co. v. Commissioner*, 2 B.T.A. 628 (1925); *Cuyahoga Abstract Title & Trust Co. v. Commissioner*, 7 B.T.A. 95, affirmed, 29 F. 2d 448 (C.A. D.C.), certiorari denied, 279 U. S. 848 (1928). Since a title plant is not an asset of a nature which gradually approaches a point where its usefulness is exhausted, but is an asset of a more or less permanent character, it has been held not to be a proper subject for depreciation (O.D. 1018, *supra*); but obsolescence allowances may be taken in some cases and the cost of the plant less the salvage value thereof spread equally over the period from the date the permanent abandonment of the plant was foreseen to the date of the permanent abandonment. I. T. 1775, *supra*; *Crooks v. Kansas City Title & Trust Co.*, 46 F. 2d 928 (C. A. 8th); *Stewart Title Guaranty Co. v. Commissioner*, 20 T. C. 630; *Commonwealth Title Co. v. Rothensies*, 124 F. Supp. 274, 286 (D.C. Penna.); cf. *Real Estate Title Co. v. United States*, 309 U. S. 13. In the present case, however, there is no contention as to obsolescence; and the fundamental question is whether the taxpayer's outlays for starter reports and old title policies may properly be expensed instead of being added to the title plant subject to obsolescence deductions.

In the Tax Court, the taxpayer relied heavily upon O.D. 1018, *supra*, which states that "the expense of

adding and incorporating in the plant records that are being made daily in the various courts and in the Recorder's office" are in the nature of ordinary and necessary repairs which are deductible currently. In this connection the Tax Court ruled that the expenditures for starter reports and old title policies which taxpayer here seeks to deduct are not the kind of expenses referred to in the ruling. The Tax Court said (R. 44-45):

Petitioner incurs the kind of expense described in the cited ruling by its continuous subscription to Edwards Abstracts which furnishes such daily records of the courts and the Recorder's office in San Francisco County. The expense under consideration here of purchasing starter reports is not the same and is distinguishable from the kind of expense described in the ruling. A starter report covers a search and examination of title and while it does not have the coverage of a completed abstract, it is within the same general category. O. D. 1018 does not refer to reports on title.

We submit that the Tax Court made no error and the distinction that it drew is a proper one.

In this Court, the taxpayer renews (Br. 15-17, 22) its reliance upon O. D. 1018 and says that the starters should be treated in the same manner as the daily records and that the distinction drawn by the Tax Court is unsound. We disagree and submit that the taxpayer overlooks the practical considerations which underlie the distinction. The situation is analogous to the costs of a set of law books. A lawyer acquiring at one time a full set of the United States Reports

purchases a capital asset subject to depreciation. Thereafter, as he purchases its current volumes, it is more practical to permit the current year's costs to be deducted instead of amortized for the computations would become too complicated and the net tax result would not be sufficiently different to justify these complications. The instant situation is also somewhat analogous to the distinction between the cost of building a newspaper's circulation structure, which is a capital expense (*Meredith Pub. Co. v. Commissioner*, 64 F. 2d 890 (C. A. 8th), certiorari denied, 290 U. S. 646; *Public Opinion Pub. Co. v. Jensen*, 76 F. 2d 494 (C. A. 8th)), and the expense of maintaining the circulation, which is currently deductible (*Perkins Bros. Co. v. Commissioner*, 78 F. 2d 152 (C. A. 8th); *Willcuts v. Minnesota Tribune Co.*, 103 F. 2d 947 (C. A. 8th), certiorari denied, 308 U. S. 577). This distinction was referred to by this Court with approval in *United States v. Times-Mirror Co.*, *supra*, 231 F. 2d at page 880. And while the law as to deductibility of circulation expenditures has been changed to some extent by Section 23(bb) of the Internal Revenue Code of 1939 and Section 173 of the Internal Revenue Code of 1954, still, those changes do not affect the basic soundness of the distinction above referred to, and they serve to emphasize the validity of that distinction where no statutory changes have been made. And see 4 Mertens, *Law of Federal Income Taxation* (1954 ed.), Section 25.23.

Taxpayer says (Br. 17) that it could obtain starter reports by the more expensive method of hiring title searchers to prepare them and if it did this the sal-

aries of the searchers would constitute a deductible expense. In this connection taxpayer refers to a recent decision of the Court of Claims (*General Motors Corp. v. United States*, decided November 2, 1960 (60-2 U.S. T.C., par. 9762)) where it was held that the corporation could deduct as a business expense the amount of certain taxes for which the various stockholders were liable, since it would cost more to calculate their respective shares of such taxes and deduct them from dividends than it would to absorb the taxes as the corporation did. Irrespective of whether this decision of the Court of Claims can be considered correct, it has little if any bearing on the instant situation where we are dealing with the purchase of property for use in the taxpayer's business and which had a useful life extending far beyond the taxable year. Such an asset does not differ materially from machinery or fixtures which are used in a business, and certainly the cost of such acquisitions should be capitalized. And assuming *arguendo* that the instant taxpayer possibly could have achieved its objectives by a different form of business dealing, that does not help it here, for the Commissioner is justified in determining the tax effect of transactions on the basis in which taxpayers have molded them. *Television Industries, Inc. v. Commissioner* (C. A. 2d), decided November 14, 1960 (60-2 U.S. T.C., par. 9795); *Gray v. Powell*, 314 U. S. 402, 414; *Founders General Co. v. Hoey*, 300 U. S. 268, 275; *Higgins v. Smith*, 308 U. S. 473, 477; *Interlochen Co. v. Commissioner*, 232 F. 2d 873, 877 (C. A. 4th); *Woodworth v. Commissioner*, 218 F. 2d 719, 724 (C. A. 6th).

And see *Ratterman v. Commissioner*, decided July 6, 1948 (1948 P-H. T.C. Memorandum Decisions, par. 48,130), affirmed, 177 F. 2d 204 (C. A. 6th), where it was held that the expenditure for a dictaphone, in lieu of compensation for a stenographer's services, was not deductible as a business expense and constituted a capital expenditure.

The taxpayer refers (Br. 19-20) to *Consolidated Apparel Co. v. Commissioner*, 17 T. C. 1570, reversed in part on other issues, 207 F. 2d 580 (C. A. 7th), where an amount subscribed and paid during the taxable year to a development and advertising association of merchants in taxpayer's business district was held deductible in full as a business expense of that year even though some future benefits might possibly ensue to the taxpayer. That case falls within the scope of the rule that where the expenditures constitute a part of a continued plan of advertising in order to keep constantly before the public the product which the taxpayer is manufacturing, the expenses should ordinarily be deducted in the year of payment notwithstanding that there may be involved some element of resulting good will. See 4 Mertens, Law of Federal Income Taxation (1954), Section 25.38. In the instant case the situation is different, for here the taxpayer made additions to its title plant which have long been treated as capital acquisitions.

Taxpayer also refers (Br. 20-21) to *E. H. Sheldon & Co. v. Commissioner*, 214 F. 2d 655 (C. A. 6th), where the court held that the cost of certain catalogs used to advertise the taxpayer's products was de-

ductible as advertising expense in the year of payment notwithstanding the fact that the catalogs would have a useful life in excess of one year. That case is of doubtful correctness, particularly since the appellate court reversed the Tax Court (an action which was disapproved in *United States v. Times-Mirror Co.*, *supra*); but in any event it is distinguishable on the ground that the payments there could reasonably be classified as advertising whereas those here can not. The instant payments were made for additions and supplements to taxpayer's title plant and such expenditures have long been treated as capital in nature, as we have pointed out above.

Taxpayer also cites (Br. 21) *Collingwood v. Commissioner*, 20 T. C. 937, where the Tax Court in an opinion written by the same judge who decided the instant case held that certain payments made for terracing work on farm lands were deductible as business expenses since nothing was added to the soil and the work was done in order to overcome erosion and thus maintain the productivity of the farms in normal and customary operation. That case differs from the instant one where permanent additions to the plant facilities were made for future use in the business when the occasion might arise. And see *RKO Theatres, Inc. v. United States*, *supra*, 163 F. Supp. at page 601.

Taxpayer states (Br. 22) that no depreciation of the title plant is allowable as a deduction; but taxpayer makes no mention of the fact that the plant is subject to obsolescence deductions. See *Stewart Title*

Guaranty Co. v. Commissioner, supra; 4 Mertens, *Law of Federal Income Taxation* (1954 ed.), Section 23.115.

Moreover, even if no depreciation or obsolescence deductions could ever be taken, it would make no difference here for the true test is the nature of the expenditure in and of itself. *Parkersburg Iron & Steel Co. v. Burnet, supra*. Thus an expenditure for land is clearly capital in nature even though no depreciation deductions can be taken. *Brand v. Commissioner*, 209 F. 2d 255 (C. A. 6th), certiorari denied, 347 U. S. 968. Here the expenditures resulted in a practically everlasting addition to the plant facilities and they were precisely within the definition of capital expenditures in Section 39.41-3 of Treasury Regulations 118, referred to above, to the effect that expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year, should be charged to a capital account and not to an expense account. These provisions have been in the Regulations for many years and have therefore acquired the force of law. *Helvering v. Winmill*, 305 U. S. 79, 83; *Schwabacher v. Commissioner, supra*.

In view of the foregoing we submit that the findings and conclusions of the Tax Court are sound and correct in all respects, and we urge this Court to uphold them.

II

**In the Alternative, Taxpayer Is Not Entitled to Change
Its Accounting Method Without First Obtaining the
Commissioner's Consent**

Section 41 of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that the net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. Treasury Regulations 118, Section 39.41-2 (Appendix, *infra*), provide that a taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. This regulation is designed to promote consistent accounting practice from year to year. The regulation is reasonable and valid (*St. Paul Union Depot Co. v. Commissioner*, 123 F. 2d 235 (C. A. 8th); *Pacific Vegetable Oil Corp. v. Commissioner*, 26 T. C. 1, reversed on another issue, 251 F. 2d 682 (C. A. 9th)); and indeed it has been codified in Section 446 of the Internal Revenue Code of 1954 (see 2 Mertens, *Law of Federal Income Taxation* (1955), Section 12.19). See also Treasury Regulations on Income Taxes (1954 Code), Section 1.446-1.

And where the Commissioner denies an application for permission to change the taxpayer's method of

accounting for purposes of taxation, the only question before the court on review is whether the Commissioner has abused his discretion. *Brown v. Helvering*, 291 U. S. 193, 204-205;² *United States Industrial Alcohol Co. v. Helvering*, 137 F. 2d 511 (C. A. 2d); *Advertisers Exchange, Inc. v. Commissioner*, 25 T. C. 1086, affirmed, 240 F. 2d 958 (C. A. 2d); *Schram v. United States*, 118 F. 2d 541 (C. A. 6th); cf. *Idaho First National Bank v. United States*, 265 F. 2d 6 (C. A. 9th).

In the instant case, the taxpayer capitalized all payments of the instant character prior to 1952 (R. 28, 37); and in the latter year, it began to treat such payments as expense items and took deductions in its income tax returns for the first time (R. 37, 114-115), as we have pointed out above. Taxpayer did not request nor obtain the consent of the Commissioner before making this change in its accounting method; and the Commissioner has at no time given his consent thereto. It follows that even if this Court should determine, contrary to our views and those of the Tax Court, that the payments in question could properly be treated as deductible business expenses, still, taxpayer is not at liberty to change its long-

² The court there said—

“The Commissioner was of opinion that the method of accounting consistently applied prior to 1923 accurately reflected the income. He was vested with a wide discretion in deciding whether to permit or to forbid a change. Compare *Bent v. Commissioner*, 56 F. 2d 99. It is not the province of the court to weigh and determine the relative merits of systems of accounting. *Lucas v. American Code Co.*, 280 U. S. 445, 449.”

standing practice of capitalizing such payments since it did not obtain the Commissioner's advance consent as required.

It seems clear that there would be no abuse of discretion on the part of the Commissioner in refusing to permit the taxpayer to change its accounting method in the instant case; and the term "accounting method" is broad enough to embrace not only overall methods such as the cash and accrual methods, but also the accounting treatment of items of income and expense. Thus, Treasury Regulations 118, Section 39.41-2, specifically refers to any change in items of income or deductions. And the Treasury Regulations on Income Taxes (1954 Code), Section 1.446-1, specifically mentions a change in the treatment of a material item. In the instant case, the taxpayer is attempting to make such a change, and therefore the consent of the Commissioner would be required in any event. See *Advertisers Exchange, Inc. v. Commissioner*, *supra*.

In the light of the foregoing considerations we submit that the determination of the Tax Court that the payments here involved were capital expenditures should be upheld by this Court.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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Washington 25, D. C.

JANUARY, 1961.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or Business Expenses*.—

(A) *In General*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

* * * *

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

(3) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made;

* * * *

(26 U.S.C. 1952 ed., Sec. 24.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.23 (a)-1 *Business expenses*. Business expenses deductible from gross income include the ordinary and necessary expenditures directly

connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. As to charitable contributions by corporations not deductible under section 23 (a), see § 39.23 (a)-13. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See § 39.22 (a)-5. Among the items included in business expenses are management expenses, commissions (but see § 39.24 (a)-2), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 39.23 (a)-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such item shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though

such expenses exceed the gross income derived during the taxable year from such business. As to items not deductible under any provision of section 23, see section 24.

* * * *

SEC. 39.23(a)-4 *Repairs*. The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as expense, provided the cost of acquisition or production or the gain or loss basis of the taxpayer's plant, equipment, or other property, as the case may be, is not increased by the amount of such expenditures. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, should be charged against the depreciation reserve if such account is kept.

SEC. 39.24 (a)-2 *Capital expenditures—(a) Expenditures except non-depreciable mine development expenditures*. Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. See section 23(1). Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * *

* * * *

SEC. 39.41-2 *Bases of computation and changes in accounting methods.* * * *

* * * *

(c) A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of this section, a change in the method of accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa; a change involving the basis of valuation employed in the computation of inventories (see §§ 39.22 (c)-1 to 39.22 (c)-8, inclusive); a change from the cash or accrual method to the long-term contract method, or vice versa; a change in the long-term contract method from the percentage of completion basis to the completed contract basis, or vice versa (see § 39.42-4); or a change involving the adoption of, or a change in the use of, any other specialized basis of computing net income such as the crop basis (see §§ 39.22 (a)-7 and 39.23 (a)-11). Application for permission to change the method of accounting employed and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return. The application shall be accompanied by a statement specifying the classes of items differently treated under the two methods and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change. Permission to change the method of accounting will

not be granted unless the taxpayer and the Commissioner agree to the terms and conditions under which the change will be effected. * * *

* * * *

SEC. 39.41-3 *Methods of accounting.* * * *

* * * *

(b) Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and

(c) In any case in which the cost of capital assets is being recovered through deductions for wear and tear, depletion, or obsolescence, any expenditure (other than ordinary repairs) made to restore the property or prolong its useful life should be added to the property account or charged against the appropriate reserve and not to current expenses.

The corresponding provisions of Sections 162(a), 263(a) and 446 of the Internal Revenue Code of 1954; and Sections 1.162-1, 1.162-4, 1.263(a) and 1.446-1 of the Treasury Regulations on Income Taxes (1954 Code) do not differ from the above in any material respect.

No. 17,050

United States Court of Appeals
For the Ninth Circuit

BAY COUNTIES TITLE GUARANTY Co.

(formerly Bay Counties Escrow Co.),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

PEART, BARATY & HASSARD,

JOSEPH S. ROGERS,

111 Sutter Street,

San Francisco 4, California,

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San Francisco 4, California,

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FILED

FEB 10 1961

FRANK H. SCHMID, CLERK



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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent's brief displays the same fundamental lack of understanding of the nature of the expenditure in question as did the opinion of the Tax Court. However, the background of this case indicates that such lack of understanding is probably more feigned than real. As indicated by respondent (p. 8), this matter commenced as a result of an agent's determination that the expenditures in question were made in violation of California law and hence not deductible. After a trial primarily pointed by all parties to this issue, respondent recognized his error and abandoned the primary issue. However, in order to justify continuance of the case, the respondent made the same two arguments to the Tax Court as are here advanced. The second argument as will be later demonstrated was so clearly without merit that the Tax Court

did not even deign to discuss it. However, because of a lack of knowledge and understanding of the function of title companies in California the Tax Court fell into the error indicated, of treating the expenditures as capital.

We believe that viewed in the context of the title insurance business, the expenditures in question are clearly deductible.

Respondent and the Tax Court err in that (1) they assert that the reports are not used in the year of purchase and hence have a useful life in excess of one year; and (2) in that they use erroneous criteria in determining whether an expenditure is deductible or is capital in nature.

**I. THE REPORTS ARE USED IMMEDIATELY
IN PETITIONER'S BUSINESS.**

The nexus of respondent's argument in support of the Tax Court's determination is that "it is clear beyond any doubt that the starter reports have an economic life extending beyond the year of purchase and that they represented additions and supplements to the plant which increased its value." (Tr. 44; Brief p. 10.)

Such argument ignores the nature of petitioner's business and the use made of the starter reports. In the first place, petitioner, fundamentally, is in the business of providing a complete real property transfer service. The services rendered by California title companies are unique. In other states, these services are rendered by attorneys and title searchers who are agents of the parties.

Suppose we compare a typical transaction occurring in California with the same transaction in New York. Obviously, the buyer will not want to part with his money until he is assured that title will be vested in him free of all liens or all liens except those he is expressly willing to assume. The seller, on the other hand does not wish to part with the deed to his property until he receives the purchase price. In New York, the buyer consults his attorney who abstracts the title until he is satisfied as to the state of the title. He determines the documents necessary to eliminate any undesired lien. He examines the documents of transfer. After he is satisfied on behalf of his client, all parties with their attorneys meet together where the documents of transfer are executed and exchanged for the consideration. To fully protect the buyer, it is necessary to ascertain whether there are any lien creating documents filed up to the time of recording the deed. This takes another person at the recorder's office to examine the filings up to the time of transfer and to the time of recording.

In California, and specifically in San Francisco, on the other hand, all this is performed by the title company, both for the buyer and the seller. Usually the transaction goes one step further in that the title company *insures* the buyer that his title is as reported. In order to perform the services required by the buyer, including the issuance of a title insurance policy, the title company must be ready at all times to (1) report the state of any title in the City and County of San Francisco quickly and economically and (2) be in a position to insure that the title is as reported without exposing itself (or

its underwriters as in the case of petitioner) to undue risk of loss if the report proves defective. Therefore, petitioner and all title companies must have readily available *all* possible information concerning *any* parcel of real property in the City and County. To this end, petitioner makes heavy expenditures for title information to maintain its title plant in an up-to-date running order. Among such expenditures for information are those in question for starter reports. These are precisely the expenditures described (although not specifically identified) in O.D. 1018, 5 Cum. Bull. 119 (1921). Respondent and the Tax Court err when they state (Tr. 44-45; Brief p. 12) that petitioner "incurs the kind of expenses described in the cited ruling by its continuous subscription to Edward's Abstracts . . ." The error is in assuming that any *one* source is sufficient to provide the information needed to keep the title plant up to date.

Further, the error is made more apparent when it is clear that the same expenditure by the other title companies *has never been challenged by respondent* and is cited without comment in his brief (p. 4). Certainly, it cannot be argued that the cost of obtaining starter reports under the so-called reciprocal arrangement is different tax-wise from the cost of procuring such reports outside of that arrangement!

The limitation placed by respondent and the Tax Court on O.D. 1018 *supra* is unwarranted by the facts and the law. The cost of obtaining a copy of a deed or other document affecting Parcel A is clearly deductible under O.D. 1018 *supra*. However, neither petitioner nor any other title company may have a transaction affecting

Parcel A this year or next year or in fact within the lifetime of any of the people involved in this case. How then, can it be seriously argued that the cost of obtaining other title information concerning Parcel A is a capital expenditure *solely* because that information may not be used in the year the cost was incurred or in fact for many years thereafter? Certainly, it is clear that the expenditures described in O.D. 1018 do not in every case or even in most cases result in a "benefit derived from the payment [] realized and exhausted within the taxable year." (Brief p. 11.)

Respondent's analogy concerning an attorney's books simply points out the error of his logic. (Brief pp. 12-13.) Petitioner during its early years purchased, set up or established the sets that are comparable to the set of United States Reports. *These were capitalized.* Now, however, in addition to the current volumes, petitioner purchases additional information in the form of briefs, copies of opinions, etc. concerning the cases currently appearing. Clearly, the purchase of such additional information, taxwise, is more like the purchase of the current volume than the purchase of the set.

Finally, respondent's reliance upon *United States v. Times-Mirror Co.* (CA 9) 231 F. 2d 876, is misplaced. In that case, this Court sustained a determination that the micro-filming of its back issues during a war emergency was a deductible current expense. The *ratio-decendi* of that case is that such expenditures are deductible and that this Court could find no error in the District Court's determination. To read into that case the principles asserted by respondent is completely unwarranted.

II. THE TAX COURT USED AN ERRONEOUS CRITERION.

It is readily apparent that the Tax Court in asserting that the expenditures in question were capital because the starters would not necessarily be used in a transaction in the year of acquisition was using the wrong criterion for determining the nature of the expenditure. In addition to the cases cited in our opening brief—all of which involved expenditures whose benefit was not exhausted in the taxable year, *United States v. Times-Mirror Co.*, *supra*, cited by respondent involved such an expenditure. The criterion used by the Tax Court in this case is expressly repudiated. So also in *Kansas City, etc. Ry. v. U. S.* (1953) 112 Fed. Supp. 165. In that case the railroad deducted the expense of driving poles in its road bed to correct the effect of water pockets. The poles when so used, solved the problem for many years. The Court of Claims in rejecting the argument that these were capital expenditures said:

“ . . . The fact that the replacements, once made, would be good for many years, would not seem to be significant. When a building or a machine is repaired, it is not unusual that the repaired portion is better than and will outlast the parts that have not yet needed repairs.”

III. THE SECOND PRINCIPAL ARGUMENT MADE BY RESPONDENT IS CLEARLY WITHOUT MERIT.

It is uncontradicted that during the years prior to January 1, 1952, petitioner, for reasons of its own, capitalized all expenses connected with its title plant. Many of these expenses included salaries and office supplies that are without doubt current expenses. Whether all these expenditures were currently deductible or not is not before this Court. However, it is *not* a change of accounting method to claim as a deduction from gross income that which has always been deductible but which the taxpayer did not claim in prior years. If this were so, taxpayers could *never* seek refunds for erroneously having treated deductible items as not deductible. Taxpayers would always be met with the argument that their election of this "method of accounting" could not be changed without consent. Certainly to state the argument advanced by respondent is to show its absurdity.

So far as the reported cases indicate, it has never been claimed that a taxpayer was barred from claiming a deduction because in prior years he treated it as a non-deductible capital item rather than claiming the deduction. The Commissioner did contend in *Beacon Publishing Co. v. Commissioner* (1955) 218 F. 2d 697, 55-1 USTC, Par. 9134, that when an accrual basis taxpayer deferred pre-paid subscriptions until the year in which the income was earned it was changing its accounting method. However, the Court of Appeals said:

"The taxpayer, however, did not seek to change its accounting system. It did no more than apply the method adopted and in use to clearly reflect its income.

This the taxpayer had the right to do and the Commissioner had the right to require it. *United States v. American Can Co.*, supra. A discretion of the Commissioner does not empower him to add to the taxpayer's gross income for a given year, an item which rightfully belongs in another year. *Commissioner v. Frame*, 8 Cir., 195 Fed. (2d) 166 [52-1 USTC, Par. 9239]; *Commissioner v. Mnookin's Estate*, 8 Cir., 184 Fed. (2d) 89 [50-2 USTC, Par. 9431].

“We have no doubt that the taxpayer could not change its method of keeping books without the consent of the Commissioner, even as to items, if the change resulted in an avoidance of the payment of taxes due, *nor do we have any doubt but that a taxpayer may, without the consent of the Commissioner, apply the method of accounting which he has adopted, though not theretofore applied to a particular item, when that change will correct errors and clearly reflect his income.* We think the change in this case falls within the latter category.” (Emphasis added.)

We do not contest the validity of the cited regulation or statute, only the application thereof to this case. An illustration will serve to point out the proper application of the cited regulation and statute: If a taxpayer had not in prior years deducted *any* depreciation, it would *not* be a change of bookkeeping within the meaning of the regulation or the statute to deduct depreciation in this taxable year. However, if in the past the taxpayer had used the straight line method of computing depreciation a change of the method of computation would be a change of bookkeeping within the statute and regulation.

CONCLUSION.

The Tax Court's disallowance of the deduction was based upon a misconception of the facts and the use of the wrong criterion. Respondent has not advanced any arguments justifying the affirmance of the Tax Court, other than those used by that Court. The decision of the Tax Court should be reversed.

Respectfully submitted,

PEART, BARATY & HASSARD,

By JOSEPH S. ROGERS,

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Attorneys for Petitioner.

No. 17050

United States
Court of Appeals
for the Ninth Circuit

BAY COUNTIES TITLE GUARANTY CO.
(formerly BAY COUNTIES ESCROW CO.),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States.

FILED

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FRANK H. SCHMID, CLERK



No. 17050

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of The United States

Docket No. 63623

BAY COUNTIES TITLE GUARANTY COMPANY,
(formerly BAY COUNTIES ESCROW COMPANY), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1956

Aug. 2—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 6—Copy of petition served on General Counsel.

Sept. 11—Answer filed by Resp. Served 9/12/56.

Sept. 11—Request for hearing in San Francisco filed by Resp. 9/12/56 Granted.

1957

Oct. 22—Notice of Trial Jan. 20, 1958, at San Francisco.

1958

Jan. 20—Petr's motion for Cont. filed at trial—Granted without obj. Cont'd generally. Served at trial 1/21/58.

June 27—Notice of Trial Oct. 6, 1958, San Francisco.

1958

July 1—Application for order to take deposition of Ralph N. Kleps, on written interrogatories, by Petr. Denied 7/17/58.

July 2—Notice of application to take deposition on written interrogatories, filed. Served 7/3/58.

July 16—Resp. objections to Petr's application for Order to take Depositions on written interrogatories.

July 17—Order that Petr's application for Order to take deposition on written interrogatories is denied.

Oct. 8, 9—Trial before Judge Harron — San Francisco.

14—Stip of facts filed at trial.

—Briefs due Nov. 24, 1958.

—Reply Briefs due Dec. 24, 1958.

Oct. 29—Transcript of Proceedings 10/8, 10/9, and 10/14/58 filed. 3 vols.

Nov. 24—Petr's Brief filed. Served 12/29/58.

Nov. 24—Motion by resp. for extension of time to Dec. 15, 1958, to file brief. 11/25/58 Granted. Served 11/28/58. Dates of briefs of both parties extended as follows: Original briefs will be due 12/15/58. R/Briefs will be due 1/14/59.

Dec. 19—Motion by resp. for leave to file brief, brief lodged. Granted 12/22/58.

Dec. 22—Brief for Resp. filed. Served 12/29/58.

1959

Jan. 22—Motion by petitioner for extension of time to Feb. 15, 1959 to file Reply Brief. Granted Jan. 23, 1959.

Feb. 18—Reply Brief for Petr. filed. Served 2/19/59.

1960

Apr. 12—Findings of Fact and Opinion filed, Judge Harron. Decision will be entered for the Resp. Served 4/12/60.

Apr. 12—Decision entered, Judge Harron. Served 4/13/60.

May 26—Motion to fix amount of bond filed by petr.

May 26—Order fixing bond at \$10,000.00. Served 5/26/60.

June 17—Surety bond in the amount of \$10,000.00 approved and filed.

July 5—Petition for Review by U. S. Ct. of Ap. 9th Cir., with proof of service thereon, filed by petr.

July 5—Designation of contents of record on rev., with proof of service thereon, filed by petr.

July 8—Proof of service of pet. for rev. filed by petr.

[Title of Tax Court and Cause.]

PETITION TO REDETERMINE TAXES

The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Service symbols Ap:SF:AA:DEU 90-D; 1B), dated May 7, 1956, and as a basis of its proceeding alleges:

I. That petitioner is a corporation duly organized, existing and authorized to do business under the laws of the State of California; that its principal place of business is at 131-135 Hayes Street in the City and County of San Francisco, State of California. Taxes and returns for the years herein involved were paid and filed to and with Director, San Francisco, California.

II. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to petitioner on May 7, 1956.

III. The deficiencies as determined by the Commissioner are for income and excess profits taxes for the calendar years 1952, 1953 and 1954 in amounts as follows:

Year	Amount
1952	\$2,068.80
1953	\$2,574.30
1954	\$1,924.71
	<hr/>
	\$6,567.81

All of said amounts hereinabove set forth are in dispute, and are disputed by petitioner.

IV. The determination of petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1952 set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner erred in determining that there should be disallowed for the calendar year 1952 for the purpose of computing petitioner's income (normal tax and surtax) and excess profits taxes certain expenses in the sum of \$6,896.00 incurred and paid in that year (Item (a) page 2 of the Statement attached to Exhibit "A" hereto).

2. The Commissioner erred in determining that petitioner's normal tax and surtax net income for the calendar year 1952 was \$11,962.56 or any sum in excess of \$5066.56.

3. The Commissioner erred in determining that petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1952 was \$3,588.77 or any sum in excess of \$1,519.97.

4. The Commissioner erred in determining that the payments in currency made by petitioner to various real estate brokers totalling \$6,896.00, \$8,581.00 and \$7,534.00 for the calendar years 1952, 1953 and 1954 respectively and charged to advertising expense are in fact rebates of escrow fees made in violation of California law and do not constitute an ordinary and necessary business expense. The Commissioner erred in determining that in the alternative these amounts constitute capital expenditures.

5. The Commissioner erred in determining that there is a deficiency in petitioner's income (normal

and surtax) and excess profits taxes for the calendar year 1952 of \$2,068.80 or any sum whatsoever.

6. Simply stated, the error complained of by petitioner for the calendar year 1952 is the disallowance of \$6,896.00 of business expenses as claimed on the return.

V. Petitioner in regard to its 1952 income and excess profits taxes concedes that the net income as disclosed by its return is \$5,066.50.

VI. The determination of petitioner's income and excess profits taxes for the calendar year 1953 set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner erred in determining that there should be disallowed for the calendar year 1953 for the purpose of computing petitioner's income (normal tax and surtax) and excess profits taxes, certain expenses in the sum of \$8,581.00 (Item (a) page 3 of the Statement attached to said Exhibit "A" hereto).

2. The Commissioner erred in determining that petitioner's normal tax and surtax net income for the calendar year 1953 was \$12,864.59 or any sum in excess of \$4,283.59.

3. The Commissioner erred in determining that petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1953 was \$3,859.38 or any sum in excess of \$1,285.08.

4. The Commissioner erred in determining that the payments in currency made by petitioner to various real estate brokers totalling \$6,896.00, \$8,581.00 and \$7,534.00 for the calendar years 1952, 1953 and

1954 respectively and charged to advertising expense are in fact rebates of escrow fees made in violation of California law and do not constitute an ordinary and necessary business expense. The Commissioner erred in determining that in the alternative these amounts constitute capital expenditures.

5. The Commissioner erred in determining that there is a deficiency in petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1953 of \$2,574.30 or any sum whatsoever.

6. Simply stated, the error complained of by petitioner for the calendar year 1953 is the disallowance of \$8,581.00 of business expenses as claimed on the return.

VII. Petitioner in regard to its 1953 income and excess profits taxes concedes that the net income as disclosed by its return is \$4,283.59.

VIII. The determination of petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1954 set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner erred in determining that there should be disallowed for the calendar year 1954 for the purposes of computing petitioner's income (normal tax and surtax) and excess profits taxes certain expenses in the sum of \$7,534.00 incurred and paid in that year (Item (a) page 4 of the Statement attached as Exhibit "A").

2. The Commissioner erred in determining that petitioner's normal tax net income and surtax net income for the calendar year 1954 was \$6,415.71 or any sum in excess of a loss of \$1,118.29.

3. The Commissioner erred in determining that petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1954 was \$1,924.71 or any sum whatsoever.

4. The Commissioner erred in determining that the payments in currency made by petitioner to various real estate brokers totaling \$6,896.00, \$8,581.00 and \$7,534.00 for the calendar years 1952, 1953 and 1954 respectively and charged to advertising expenses are in fact rebates of escrow fees made in violation of California law and do not constitute an ordinary and necessary business expense. The Commissioner erred in determining that in the alternative these amounts constitute capital expenditures.

5. The Commissioner erred in determining that there should be a disallowance of \$7,534.00 claimed on the return as advertising expenses.

6. The Commissioner erred in determining that there is a deficiency in petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1954 of \$1,924.71 or any sum whatsoever.

7. Simply stated, the error complained of by petitioner for the calendar year 1954 is the disallowance of \$7,534.00 for business expenses as claimed on the return.

IX. Petitioner in respect to its 1954 income and excess profits taxes concedes that the net income as disclosed by its return is a loss of \$1,118.29.

X. The facts upon which petitioner relies as a basis of this proceeding are as follows:

1. Petitioner was incorporated in the State of California in July, 1946. Actual business was commenced in January of 1947. Its authorized capital is \$25,000.00. During the years 1947, 1948, 1949, 1950 and 1951, petitioner was building its title plant. All expenditures made for the acquisition of title information was capitalized during that period. In all, petitioner has a title plant with a capitalized cost of \$25,000.00, equal to its authorized capital. During this period of time petitioner expended \$25,000.00 in various ways—having tract maps prepared—purchasing tract maps—securing the tax assessor's title maps and other title information. At the conclusion of the above five year period, petitioner's title plant not only covered that five year period, but, because of the large expenditure of money, time and effort, the title plant went back a period of five years or more from 1947. Thus, petitioner's title plant on January 1, 1952, more than doubled the customary five year experience. Petitioner had also capitalized its title plant by twice the amount allowed with reference to its authorized capital. Petitioner's title plant was therefore complete long before January 1, 1952. The cost of reports and title insurance policies to petitioner is not a capital expense, but is an expense

incurred for the purchase of opinions of title which is similar to the expenses incurred for base searching and examination, and is therefore deductible in the year in which incurred and paid or accrued. The purchase of such reports by petitioner is a matter of business economy and efficiency, and actually decreases the cost of operation. The preliminary reports and policies of title insurance purchased by petitioner do not actually increase the value of the title plant of petitioner.

2. During the tax years 1952, 1953 and 1954, petitioner made expenditures in currency to real estate brokers to purchase, in some cases preliminary title reports issued by other companies, and in other cases to secure assignments of the actual title insurance issued by the other companies. Usually, the preliminary reports purchased did not relate to any transaction then being handled by petitioner for the real estate broker. However, in some cases the reports and/or insurance formed the basis upon which the title insurance was issued in a transaction being consummated at the time. All of such expenditures were in the nature of day to day maintenance of petitioner's title plant and were therefore ordinary and necessary expenses.

3. That the expenditure in the calendar year 1952 of \$6,896.00 for advertising was both reasonable, ordinary and necessary to the business carried on by petitioner.

4. That the expenditure in 1953 of \$8,581.00 for advertising was both reasonable, ordinary and necessary to the business carried on by petitioner.

5. That the expenditure in 1954 of \$7,534.00 for advertising was reasonable, ordinary and necessary to the business carried on by petitioner.

6. That the expenditures hereinbefore mentioned in the three paragraphs next preceding were incurred and paid for the purpose of upkeep and maintenance of petitioner's title plant.

Wherefore, petitioner prays that the court may hear this proceeding and determine that:

A. There should not be disallowed in determining petitioner's normal and surtax income for the year 1952 the sum of \$6,896.00 or any sum whatsoever.

B. Petitioner's normal and surtax net income for the calendar year 1952 was not \$11,962.56 or any sum in excess of \$5,066.36.

C. Petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1952 was not \$3,588.77 or any sum in excess of \$1,519.97.

D. There was no deficiency in petitioner's income (normal and surtax) and excess profits taxes for the calendar year 1952 in the sum of \$2,068.80 or any sum whatsoever.

E. There should not be disallowed in determining petitioner's net income and surtax net income for the calendar year 1953 the sum of \$8,581 or any sum whatsoever.

F. Petitioner's normal and surtax net income for the calendar year 1953 was not \$12,864.59 or any sum in excess of \$4,283.59.

G. Petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1953 was not \$3,859.38 or any sum in excess of \$1,285.08.

H. There was no deficiency in petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1953 in the sum of \$2,574.30 or any sum whatsoever.

I. There should not be disallowed in computing petitioner's normal tax and surtax net income for the calendar year of 1954 the sum of \$7,534.00 or any sum whatsoever.

J. Petitioner's normal and surtax net income for the current year 1954 was not \$6,415.71 or any sum in excess of a loss of \$1,118.29.

K. Petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1954 was not \$1,924.71 or any sum whatsoever.

L. There was no deficiency in petitioner's income (normal tax and surtax) and excess profits taxes for the calendar year 1954 in the sum of \$1,924.71 or any sum whatsoever.

M. And for such other and further relief as may be proper.

/s/ JOSEPH S. ROGERS,

/s/ KENNETH S. CAREY,

Attorneys for Petitioner.

Affidavit

State of California,
City and County of San Francisco—ss.

J. M. Rolls, being first duly sworn, deposes and says:

That he is an officer, to wit, the President of Bay Counties Title Guaranty Company, a corporation, and for that reason makes this affidavit on its behalf and has the authority to act for said corporation; that he has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true of his own knowledge except as to matters therein stated upon information or belief, and that as to those matters he believes it to be true.

/s/ J. M. ROLLS.

Subscribed and sworn to before me this 27th day of July, 1956.

[Seal] /s/ RUTH M. PARRIS,

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires: 5th November, 1956.

EXHIBIT "A"

Appellate Division—San Francisco Region
Room 1010—870 Market Street
San Francisco 2, California

Ap:SF:AA:DRU

90-D:IB

May 7, 1956

Bay Counties Title Guaranty Company
(formerly Bay Counties Escrow Company)
131-135 Hayes Street
San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1952 to December 31, 1954, inclusive, discloses a deficiency or deficiencies of \$6,567.81 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th

Exhibit "A"—(Continued)

day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Rm. 1010, 870 Market St., San Francisco 2, California. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON

Commissioner,

By

Special Assistant

Appellate Division

Enclosures:

Statement

Agreement Form

IRS Form 160

Exhibit "A"—(Continued)

Ap:SF:AA:DRU

90-D:IB

STATEMENT

Bay Counties Title Guaranty Company (formerly Bay Counties Escrow Company) 131-135 Hayes Street, San Francisco, California

Tax Liability for the Taxable Years Ended December 31, 1952
to December 31, 1954, Inclusive.

Year		Liability	Assessed	Deficiency
1952	Income Tax	\$3,588.77	\$1,519.97	\$2,068.80
1953	Income Tax	3,859.38	1,285.08	2,574.30
1954	Income Tax	1,924.71	None	1,924.71
Totals		<u>\$9,372.86</u>	<u>\$2,805.05</u>	<u>\$6,567.81</u>

In making this determination of your income tax liability, careful consideration has been given to your protest dated December 29, 1955 and to the statement made at the conferences held on March 7, March 14 and April 17, 1956.

A copy of this letter and statement has been mailed to your representatives, Messrs. Joseph D. Rogers and Kenneth Carey, 111 Sutter Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Income

Year: 1952

Net income as disclosed by return	\$ 5,066.56
Unallowable deductions and additional income:	
(a) Advertising expense	6,896.00
Net income as adjusted	<u>\$11,962.56</u>

Explanation of Adjustments

(a) It is held that the payments in currency made by you to various real estate brokers totaling \$6,896.00, \$8,581.00 and \$7,534.00 for the calendar years 1952, 1953 and 1954 respectively and charged to advertising expense are in fact rebates of escrow fees made in violation of California law and do not constitute an ordinary and necessary business expense.

In the alternative these amounts constitute capital expenditures.

Exhibit "A"—(Continued)

Computation of Income Tax

Year: 1952

Net income	\$11,962.56
Surtax net income	11,962.56
Combined normal tax and surtax at 30%	3,588.77
Total income and excess profits tax liability	3,588.77
Income and excess profits tax assessed Account No. CI 10456, San Francisco, California	1,519.97
Deficiency in income and excess profits tax	2,068.80

Adjustments to Income

Year: 1953

Net income as disclosed by return	\$ 4,283.59
Unallowable deductions and additional income: (a) Advertising expense	8,581.00
Net income as adjusted	\$12,864.59

Explanation of Adjustments

(a) The amount of \$8,581.00 claimed on the return as advertising expense is disallowed as explained in Explanation of Adjustments in the year 1952.

Computation of Income Tax

Year: 1953

Net income	\$12,864.59
Surtax net income	\$12,864.59
Combined normal tax and surtax at 30%	\$ 3,859.38
Total income and excess profits tax liability	\$ 3,859.38
Income and excess profits tax assessed Account No. CI 200184, San Francisco, California	1,285.08
Deficiency in income and excess profits tax	\$ 2,574.30

Adjustments to Income

Year: 1954

Net income as disclosed by return (loss)	\$(1,118.29)
Unallowable deductions and additional income: (a) Advertising expense	7,534.00
Net income as adjusted	\$ 6,415.71

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) The amount of \$7,534.00 claimed on the return as advertising expense is disallowed as explained in Explanation of Adjustments in the year 1952.

Computation of Income Tax

Year: 1954

Net Income	\$6,415.71
Surtax net income	\$6,415.71
Combined normal tax and surtax at 30%	\$1,924.71
Total income and excess profits tax liability.....	\$1,924.71
Income and excess profits tax assessed Account No.	
CN 200063, San Francisco, California	None
<hr/>	
Deficiency in income and excess profits tax	\$1,924.71
Agreement Form	
IRS Form 160	

[Endorsed]: T.C.U.S. Filed August 2, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

I, II, III. Admits the allegations in paragraphs I, II and III.

IV-1 to 6, inclusive. Denies the allegations of error in subparagraphs 1 to 6, inclusive, of paragraph IV.

V. Admits the allegations in paragraph V.

VI-1 to 6, inclusive. Denies the allegations of error in subparagraphs 1 to 6, inclusive, of paragraph VI.

VII. Admits the allegations in paragraph VII.

VIII-1 to 7, inclusive. Denies the allegations of error in subparagraphs 1 to 7, inclusive, of paragraph VIII.

IX. Admits the allegations in paragraph IX.

X-1 to 6, inclusive. Denies the allegations in subparagraphs 1 to 6, inclusive, of paragraph X.

XI. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES, J.,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
T. M. Mather, Assistant Regional Counsel, Edward H. Boyle, Special Attorney, Internal Revenue Service, 1067 Flood Building, San Francisco, California.

[Endorsed]: T.C.U.S. Filed September 11, 1956.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed between the Commissioner of Internal Revenue and the above entitled taxpayer, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy:

1. That petitioner is a corporation duly organized, existing and authorized to do business under the laws of the State of California; that its principal place of business is at 131-135 Hayes Street in the City and County of San Francisco, State of California. Taxes and returns for the years herein involved were paid to and filed with Director of Internal Revenue, San Francisco, California.

2. The petitioner is not a title insurer but is an underwritten title company as defined in Section 12402 of the Insurance Code of California. Such insurance policies as are required are underwritten by Pacific Coast Title Insurance Company of Los Angeles, California, and co-insured by Louisville Title Insurance Company of Louisville, Kentucky.

3. Petitioner's income tax returns for 1952, 1953 and 1954 were filed with the Director of Internal Revenue, San Francisco.

4. The notice of deficiency (a copy of which is attached to the petition and marked Exhibit "A") was mailed to petitioner on May 7, 1956.

5. The deficiencies as determined by the Commissioner are for income and excess profits taxes for the calendar years 1952, 1953 and 1954, in amounts as follows:

Year	Amount
1952	\$2,068.80
1953	2,574.30
1954	1,924.71
	<hr/>
	\$6,567.81

All of said amounts hereinabove set forth are in dispute, and are disputed by petitioner.

6. That the net or taxable income disclosed by petitioner's 1952 tax return was \$5,066.56.

7. That in the calendar year 1952, petitioner expended \$6,896.00 in currency to real estate brokers.

8. That the net or taxable income shown by petitioner's 1953 tax return was \$4,283.59.

9. That in the calendar year 1953 petitioner expended \$8,581.00 in currency to real estate brokers.

10. That the net or taxable income shown in petitioner's 1954 tax return was a net loss of \$1,118.29.

11. That in the calendar year 1954, petitioner expended \$7,534.00 in currency to real estate brokers.

12. Petitioner was incorporated in the State of California on July 3, 1946. A copy of the Articles of Incorporation is attached hereto as Exhibit "1-A".

/s/ JOSEPH S. ROGERS,
/s/ KENNETH S. CAREY,
Counsel for Petitioner.

/s/ ARCH M. CANTRALL, E.H.B.,
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed October 8, 1958.

34 T. C. No. 3

Tax Court of the United States

Bay Counties Title Guaranty Company, Petitioner,
v. Commissioner of Internal Revenue, Respondent.

Docket No. 63623

Filed April 12, 1960.

FINDINGS OF FACT AND OPINION

Petitioner is an underwritten title and controlled escrow company engaged in the business of making abstracts of titles. It had an established title plant prior to 1952 which was its chief capital asset. Since petitioner started business it has followed the

practice of acquiring for a consideration from others each year a substantial number of previously prepared title reports showing the status of titles to pieces of property up to some date prior to petitioner's purchase. Most of such title reports were filed in petitioner's records for use in subsequent years depending on when the petitioner might receive business requiring its preparation of up-to-date abstracts on the same pieces of property in connection with new transactions. Prior to 1952 petitioner charged the cost of such reports to the capital account for its title plant, but in 1952 it charged the same expense to current operating expenses and deducted it as ordinary and necessary business expense. The same practice was followed in 1953 and 1954. Held: The purchased title reports represented additions to and betterments of petitioner's title plant; their useful life extended beyond the year of purchase; and the expenditure was a nondeductible capital expense.

Kenneth S. Carey, Esq., and Joseph S. Rogers, Esq., for the petitioner.

Edward H. Boyle, Esq., and Joseph D. Holmes, Jr., Esq., for the respondent.

The Commissioner determined deficiencies in income tax for the taxable years 1952, 1953, and 1954 in the amounts of \$2,068.80, \$2,574.30, and \$1,924.71, respectively. The issue is whether expenditures in each year which allegedly were made for copies of preliminary reports on pieces of real estate constitute ordinary and necessary expenses of carrying on petitioner's business under section 23(a)(1)(A),

1939 Code, and section 162, 1954 Code, or are non-deductible capital expenditures.

Findings of Fact

The petitioner is a California corporation which was incorporated on July 3, 1946, and entered into business operations in September 1946. Its office is in San Francisco, California. It filed its returns with the collector of internal revenue for the first district of California. Petitioner keeps its books and reports income on an accrual basis. However, the expenditures in question were cash disbursements.

The petitioner is an underwritten title company, as defined in section 12402 of the California Insurance Code, and escrow company. Petitioner is an agent of the Pacific Coast Title Insurance Company of Los Angeles, hereinafter called Pacific Title, which began business in 1944 and has nine other agents.

Pacific Title is engaged in the title insurance business. It is an underwriting company which issues policies of title insurance insuring titles to real property. Its co-insurer is the Louisville Title Insurance Company of Louisville, Kentucky. The president of the petitioner, J. M. Rolls, is an assistant secretary of Pacific Title.

The petitioner conducts examinations and searches of titles and then requests Pacific Title to issue policies of title insurance based upon its title examination. The petitioner sells title insurance policies of Pacific Title.

The petitioner, as agent of Pacific Title, has an exclusive agency in San Francisco County which includes the city of San Francisco. The records for title examination and search are in the offices of the petitioner.

The petitioner is also an escrow company. The closings of transactions involving transfers of real estate are held in its offices. Petitioner receives escrow fees for its services which are paid by the purchasers of real estate. A great deal of petitioner's business is referred by real estate brokers. Petitioner also handles accommodation and other escrows and it receives income from such general services in addition to fees for the closing of real estate transactions.

As of December 31, 1951, petitioner had an established and a typical title plant. The term "plant" is used by title companies to describe collectively the complex of the records which it owns and uses in making searches of titles and preparing abstracts of titles to all of the real estate within the area of a company's operations. Petitioner's title plant included books of maps of all of the real estate, by parcels and lots, in San Francisco County; the lot books covering every lot in the county; books of abstracts of recorded instruments; a set of general indices; the tax assessor's ownership records back to 1938; a complete set of Edwards Abstracts going back to 1908, which contains daily reports of all recordings affecting titles to and interests in real estate such as transfers, bankruptcies, probate records, and litigation; and an accumulation of peti-

tioner's records of searches, abstracts, documents, opinions, and miscellaneous data. Petitioner's title plant was acquired and accumulated during the 5 years 1947-1951. A typical title plant is augmented in the course of time.

In carrying on its business, petitioner uses its own basic records and, in addition, the city and county recorder's office records, and other customary sources of relevant records. In its own plant, information is segregated as to pieces of property in connection with which a code system is used.

For all practical purposes, as of the end of 1951, petitioner's title plant contained records of every piece of property in San Francisco County for which records existed. Also, its records in its plant showed every recorded transaction affecting real property in the county for a period in excess of 5 years. The set of Edwards Abstracts provides information back to 1908. Because of the destruction of records in 1906 during the San Francisco fire, property records for the city and county of San Francisco were reestablished after 1906.

Petitioner's capital consists of \$25,000 represented by common stock. Its authorized stock is 2,500 shares having a total par value of \$25,000.

At the end of 1951, the book value of petitioner's title plant was \$25,000.

Prior to 1952, the petitioner charged to capital, i.e., capitalized, all of its expenditures for real estate records of every kind including those for its basic title records plant. By the end of 1951, the total cost of petitioner's plant amounted to \$25,000.

When petitioner began its business in 1946, it had 4 employees. In 1952, it had 34 employees including 13 searchers and 2 examiners, and 3 in the general indices section. The work of a searcher is to search and assemble material relating to titles; the examiner writes an abstract report and opinion about titles.

In general, in order to collect the information required before a policy of title insurance will be issued, it is necessary to make a complete search of the records of ownership of a piece of property (the chain of title) over a period of years, to search for interests in and encumbrances on a title, and to examine all records affecting title so as to determine whether a buyer will obtain a clear title, and so as to guarantee a title or the correctness of information with respect thereto. A factual determination of title must be made and of the conditions and limitations attaching to the title to property.

There are no statutory requirements relating to the method or means by which those engaged in making title searches, examinations, and abstracts of title for use by title insurers shall secure information. Although it is customary for title companies to cause to be made independent searches, it is also common for their examiners to make use of previously prepared, or old, title reports and preliminary title reports as a starter, and to search the period after the end-date of such reports to bring the search up to the date required. The practice of using existing preliminary reports on titles

and existing title insurance policies is generally followed. Such practice eliminates the procedure of abstracting the title to a piece of property back to the first record. If there is a starter report of title to a particular piece of property, it is generally considered unnecessary to make a complete search back to the earliest records. But if a starter report is not available, a complete search must be made. Frequently a starter report, or a previously prepared policy of title insurance, provides a title record up to within a few years of the date of the examination which is to be made.

In the title company business a preliminary report and a starter report mean the same thing. A title examiner seldom retraces the search covered by a starter report or a previously prepared title policy; he does not go behind the starter report. Time and expense are saved where starter reports on a piece of property are used in examining the title to a piece of property.

In San Francisco there are four old and well-established title companies which issue policies of title insurance, the California Pacific Title Company, Western Title Insurance and Guaranty Company, Northern Counties Title Insurance Company, and City Title Insurance Company. Among them, there is an understanding and arrangement for the reciprocal exchange of information about real estate titles which each has in its files. Thus, one concern making a search of title to a piece of real estate with respect to which another previously has made

an examination may make use of the existing report made by the other concern, as a starter.

The petitioner is not admitted to participation in the reciprocal exchange arrangements of the four above-named title companies. The petitioner and Pacific Title compete with the above companies.

Some title companies purchase copies of preliminary, starter reports and of old title policies from various sources, such as real estate brokers, escrow companies, and lending institutions, and in California this is a common practice. There is no statutory reason why a title insurance company or an abstract company may not purchase a copy of an old title insurance policy or preliminary report on a specific property and issue a new policy of title insurance relying in whole or in part upon information contained in the former policy.

Petitioner has followed the practice since it began business of obtaining copies of preliminary, starter reports and of old title policies from real estate concerns, real estate brokers, lending institutions, and others. It followed that practice before and during the taxable years. It has made payments for them or sometimes it has obtained them free of charge.

It is routine for a real estate broker who is handling a proposed transaction for the sale of a piece of real estate to obtain an up-to-date preliminary report on the particular property involved. Such preliminary report shows the owner of record, the

tax status of the property, liens and encumbrances, if any, existing restrictions, and obligations of the record owner. Such preliminary title report is obtained from the title company from which it is anticipated the completed title insurance policy will be purchased when the sale is closed. No charge is made for the preliminary report by the title company since the full charge will be made for the title policy. The title policy will be the complete and current coverage. In connection with a proposed sale of a piece of property, the real estate broker often is asked by the title company with which he is dealing in respect to the contemplated sale if he can furnish a previous title policy, or a copy. If the real estate broker can furnish a previous policy, he may obtain the requested preliminary report of the title company sooner.

Before and after 1951, several real estate brokers in the San Francisco area have frequently furnished the petitioner with copies, from their files, of preliminary reports and of title policies on various pieces of real estate involved in transactions which they have handled in the past and in which transactions the petitioner did not participate, for which they have received cash payments from the petitioner. Often copies of such reports or old title policies on a particular piece of property have been furnished upon requests of petitioner, and at times petitioner has made use of them in its current search on a particular property. At other times, petitioner has put copies of preliminary re-

ports or of old title policies in its files to serve as a starter in a future search.

In most instances, real estate brokers do not charge any stated fee or exact amount for furnishing a copy of a preliminary report or old title policy to the petitioner, and petitioner has followed the practice of making payments periodically to real estate brokers of some amounts which it determined. Such payments, at times, have been made monthly and they have been in varying amounts ranging from \$25, \$60, \$90, \$100, or more.

In 1952, as an example, petitioner had an arrangement with one real estate firm in San Francisco whereby it could look through its files and locate copies of preliminary reports or old title policies which it wanted to use and obtain them at no cost. In another instance, a real estate broker having his own business regularly provided petitioner with copies of preliminary reports or old title policies from his files and he periodically received lump sum payments from petitioner for such general accommodation but not for individual copies of report or policies. Such payments always were made in cash.

During the taxable years, petitioner made cash payments to real estate brokers in the total amounts set forth below:

Year	Amount
1952	\$6,896
1953	8,581
1954	7,534

The following schedule shows the amounts of such cash payments by months:

Month	1952	1953	1954
January	\$ 386	\$ 736	\$ - 0 -
February	505	521	556
March	484	532	467
April	482	729	812
May	503	651	470
June	575	644	480
July	579	687	645
August	671	715	674
September	530	778	589
October	661	704	693
November	804	768	700
December	716	1,116	1,448
	<hr/>	<hr/>	<hr/>
	\$ 6,896	\$ 8,581	\$ 7,534

The names of the real estate brokers and the payments received by them in 1952, 1953, and 1954 were not reflected in the books and records of petitioner, but were in a personal record belonging to petitioner's president, Rolls. The payments to the real estate brokers were made by Rolls personally in cash. Checks of the petitioner were made payable to cash and cash was made available in this way to make payments to real estate brokers. The account-

ing records showed the cash withdrawals, and the amounts of the payments to real estate brokers were charged on the books to an expense account such as advertising expense.

In petitioner's returns for the taxable year 1952-1954, inclusive, the total amounts paid to brokers, stated above, were included in the entire amount deducted in each year for advertising expense, or some other operating expense.

There have been many instances where real estate brokers have placed business with the petitioner and the petitioner has not purchased any title reports or copies of old title policies from them.

Rolls kept a personal record, apart from the accounting record of the petitioner, of the payments made to brokers which he describes as his personal, broker account record. He maintained those records. They show the volume of business received from various real estate brokers. In these records Rolls made note of the amounts of payments which he made to real estate brokers, and he also entered the amounts involved in transactions handled by the petitioner which were closed by the individual brokers. However, this particular record does not show what preliminary reports and copies of title policies on particular pieces of real estate might have been received by the petitioner from any individual real estate broker.

Neither the petitioner nor its president, Rolls, maintained any record at any time, including the taxable years, showing the specific preliminary title reports or copies of old title policies on particular

pieces of real estate which the petitioner had purchased during a year from any real estate broker or any other source. Of course, reference to such individual preliminary title reports and copies of old title policies might indicate to whom or for whom the reports were made and, therefore, an inference might be drawn with respect to the concerns or persons from whom the petitioner acquired such reports and title policies. Petitioner did not keep a record of how many preliminary reports or old title policies on various pieces of real estate it had purchased in each of the taxable years.

The petitioner's system for filing the copies of preliminary title reports and old title policies on various pieces of property is as follows: Petitioner's office records are maintained on the basis of the assessor's lot and block system. The number of a lot and its location in a block is entered in the upper right-hand corner of a copy of a preliminary title report or old title policy. Such numbers serve to relate such documents to the petitioner's index of properties in its title plant. On the individual cards in petitioner's card system, which serves as an index to records on individual pieces of property in the county of San Francisco, a red letter "S" is placed to show that petitioner has a preliminary title report or a copy of an old title policy relating to a piece of property. Through such index system, the petitioner is able to determine whether or not it has a preliminary title report on a piece of property which can be used as a starter when

and if it makes a title search and abstract on the property.

During the years 1952-1954, petitioner acquired many preliminary title reports or copies of old title policies; it paid for some of these documents; and it filed them in its plant records. The bulk of the preliminary title reports and title policies which petitioner purchased during the taxable years did not relate to any searches and examinations of titles which it made in the taxable years for the issuance of title insurance policies. Therefore, such documents were filed for such future use, if any, as might develop.

Prior to 1952, petitioner capitalized in its accounting records all payments for preliminary title reports and all old title policies. Petitioner, for the first time, in 1952, 1953, and 1954 charged all payments for such preliminary title reports and old title policies to current operating expenses and took deductions therefor in its income tax returns. The respondent disallowed the entire amounts of the deductions, \$6,896 in 1952, \$8,581 in 1953, and \$7,534 in 1954.

The preliminary title reports and old title policies purchased by the petitioner in each taxable year had a useful life beyond the year of purchase which extended until such years as petitioner might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them. The future time of use in petitioner's business was problematic and indefinite depending upon

when, as, and if the petitioner might be called upon to make abstracts of title to the same pieces of property. The old preliminary title reports and old title policies constituted additions and betterments to petitioner's title plant, and the expenditure for them was a nondeductible capital expense. The expenditures were not current maintenance expenses within the category of ordinary and necessary business expenses.

Opinion

Harron, Judge: The issue relates to the matter of the proper treatment for tax purposes of an expense which petitioner incurs and pays in cash each year to real estate brokers, chiefly, for preliminary title reports and copies of not-current title insurance policies which have been prepared and used previously by others in the same business. For convenience such material is described hereinafter, collectively, as starter reports.

It is understood that for the most part each of the starter reports acquired deals with the status of the title to an individual and different piece of real estate up to a date which is prior to the time of petitioner's purchase, although petitioner concedes that there are instances of purchasing more than one report which relates to the same piece of property, in which event there is some duplication of starter reports which are purchased.

It is understood, further, that the petitioner makes no effort to ascribe a purchase price to each

individual starter report which it acquires; that sellers of such reports do not fix a price for each report sold to petitioner; that petitioner pays a lump sum periodically (usually monthly) for several reports; and that during a year an undisclosed number of starter reports are purchased. Thus, for example, the record does not show how many reports petitioner purchased in 1952 for \$6,896, or in 1953 for \$8,581, or in 1954 for \$7,534.

It is understood, also, that the petitioner concedes that "the bulk" or most of the reports which it purchases in a year are not, during the same year as the expense is incurred and paid, made use of in the searches, examinations, and writing of abstracts of title on individual pieces of real estate, but, rather, are filed away in petitioner's files of records for future use, if, as, and when petitioner should write abstracts of the title to any of the properties covered by such starter reports.

It is noted at the outset, in addition, that the record does not show anything about the fees, or rates of charges, which petitioner receives for a title abstract, or what elements enter into its costs of making the search, the examination, and finally writing a title abstract. For example, the petitioner does not contend, where it makes use of one of the purchased starter reports on the title to a piece of property in its search and writing of a title abstract which is brought up to the date of the closing of a real estate transaction, that it includes

in its charge for its completed abstract any amount as its cost of the purchased starter report.

The facts have been set forth fully in the Findings of Fact and with the foregoing summary of certain relevant factors, the circumstances within which the issue to be decided arises is, we think, clear.

The primary question is whether the total amount of expense paid in each taxable year is a non-deductible capital expense under section 24(a)(2), or ordinary and necessary business expense deductible under section 23(a)(1)(A). For convenience, reference is made to the applicable sections of the 1939 Code. The corresponding provisions of the 1954 Code are substantially the same.

In substance, it is the petitioner's view that the expense of purchasing starter reports which, for the most part, are held in expectation of future use, is comparable to the expense of maintaining its title plant, a capital asset, in good and efficient working condition. Having such starter reports on hand, argues the petitioner, later saves time and expense in writing a particular title abstract. Such alleged maintenance expense is claimed by the petitioner to be of the same nature as ordinary maintenance expenditures which do not benefit future periods and are, therefore, properly charged to operations in the year the expenses are incurred and paid, and are deductible as ordinary and necessary expenses of petitioner's business. The petitioner does not cite any case specifically dealing

with the issue to be decided. However, petitioner relies largely upon the respondent's O.D. 1018 (1921), 5 C.B. 119, set forth in the margin.¹

Whether a given expense is an ordinary and necessary business expense deductible from gross income in the year of payment under section 23(a) (1)(A), or whether it constitutes an amount paid for an asset, or an addition to assets, or a betterment which increases the value of assets so as to be not deductible under section 24(a)(2) is a question of fact. *Russell Box Co. v. Commissioner*, 208 F. 2d 452, 454. It is often a difficult matter to draw the line between a capital outlay and one for current maintenance. *Hotel Kingkade v. Commissioner*, 180 F. 2d 310, 312. It is helpful to bear in mind, nevertheless, the basic distinction between an

¹ O.D. 1018 is as follows:

Title abstract companies incur relatively large and continuous expenditures in keeping their plants up to date, such as the expense of adding and incorporating in the plant records that are being made daily in the various courts and in the Recorder's office.

These records which are added to and incorporated in the plant for the purpose of keeping it in up to date running order and preventing depreciation are in the nature of ordinary and necessary repairs. The expenses, therefore, incurred in making such records are current expenses, and as such are deductible for the years in which incurred and paid or accrued.

Since a title plant is not an asset of a nature which gradually approaches a point where its usefulness is exhausted, but is an asset of a more or less permanent character, it is not a proper subject of a depreciation allowance.

ordinary and necessary business expense and a capital expenditure. In this connection, the following statement of the fundamental distinction, stated in Kester, *Principles of Accounting*, p. 130, is helpful:

Asset and Expense Expenditures.—At the time of organization of a business, the capital contributed by the owner is expended to acquire the necessary assets with which to carry on the business. A fundamental distinction must be made between expenditures for the purchase and installation of the assets themselves and expenditures for expenses in connection with their repair, maintenance, and upkeep.

An asset account is chargeable with all costs incurred up to the point of putting the asset in shape for use in the business. It may be charged also with subsequent expenditures resulting in an increase in its value. Such increase is frequently termed a betterment. Expenditures, however, which are for the purpose of repairs or of keeping the property from too rapid depreciation without adding anything to its original value, must be charged to a properly labeled expense account. These expenditures for expenses, such as repairs, maintenance, upkeep, together with depreciation, are subtractions from profit and proprietorship, while asset expenditures usually constitute an exchange of the asset cash for some other asset, which exchange has no effect on proprietorship.

These expenditures are frequently distinguished as capital and revenue expenditures.

After fully considering the complete record and petitioner's contentions and arguments, it is concluded that total expense of purchasing starter reports in each of the taxable years, incurred and paid in each year, is a nondeductible capital expense which properly is to be charged to petitioner's asset account for its title plant as an expenditure which increases the title plant's value and is for betterment thereof, in general. Upon all of the facts and under all of the circumstances, it cannot be found and held that the respondent erred in disallowing the claimed deduction in each year.

Petitioner contends, and it may be conceded, that as of the end of 1951 it had an established title plant, the cost of which had been capitalized. Petitioner agrees that the records which constitute a title plant are capital assets, as is now well established. See *The Record Abstract Co.*, 2 B.T.A. 628, 631-632; *Cuyahoga Abstract Title & Trust Co.*, 7 B.T.A. 95, 98-99, *affd.* 29 F. 2d 448, *certiorari denied* 279 U.S. 848; *Crooks v. Kansas City Title & Trust Co.*, 46 F. 2d 928. Petitioner, however, is in error in its contention that since it had a title plant, the expense of purchasing previously prepared starter reports for title abstracts necessarily is a maintenance and, therefore, current operating expense.

It is admitted that the value of the starter reports extends beyond the year of purchase and continues until such time in some indeterminate future year as petitioner shall have the occasion to write an abstract on a title covered up to a point

by a starter report. The time of future use may be many years later. We think it is clear beyond any doubt that the starter reports have an economic life extended beyond the year of purchase and that they represented additions and supplements to the plant which increased its value. It is a generally accepted rule that an amount expended for an asset having a useful life which is not consumed in the year of the expenditure is usually to be classified as a capital item. First National Bank of St. Louis, 3 B.T.A. 807; W. B. Harbeson Lumber Co., 24 B.T.A. 542.

Petitioner's reliance upon respondent's O.D. 1018 is misplaced. First, it must be observed that an Office Decision of the Commissioner lacks the status of a regulation and ordinarily must be regarded as having limited weight circumscribed by its particular facts. O.D. 1018 refers to the expense of obtaining "records that are being made daily in various courts and in the Recorder's office" which title abstract companies continuously incur. Petitioner incurs the kind of expense described in the cited ruling by its continuous subscription to Edwards Abstracts which furnishes such daily records of the courts and the Recorder's office in San Francisco County. The expense under consideration here of purchasing starter reports is not the same and is distinguishable from the kind of expense described in the ruling. A starter report covers a search and examination of title and while it does not have the coverage of a completed abstract, it is

within the same general category. O.D. 1018 does not refer to reports on title.

The petitioner advances another argument which deals with the limitation contained in section 12372 of the California Insurance Code on a title insurer's valuation on its plant as an asset. Petitioner contends that since one of the provisions of that statutory provision limits the valuation of its title plant to actual cost, not to exceed 50 per cent of the total par value of its outstanding capital stock, it could not, after 1951, add to the then cost of its plant the amount expended in each year for starter reports. This contention has no relevance here and is without merit. Section 12372 of the Insurance Code deals *inter alia* with an insurer's financial statement. It provides, also, in subsections (b) and (c) that an insurer may, in its statement, treat its plant as an asset having a lesser value than 50 per cent of the par value of outstanding stock, as allowed in (a); or it may omit entirely from the statement such asset. In any event, the cited provision of the California Insurance Code does not in any respect bear upon, relate to, or control the question here which arises under the Federal Internal Revenue Codes.

Cases cited by the petitioner have been considered but they are distinguishable. Consolidated Apparel Co., 17 T.C. 1570, affirmed and reversed in part on other grounds, 207 F. 2d 580, is distinguishable from this case in that the expense there, advertising expense, was clearly an item which properly can be expensed.

1953, and 1954 in the amounts of \$2,068.80, \$2,574.30, and \$1,924.71, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered April 12, 1960.

Served April 13, 1960.

In the United States Court of Appeals
For the Ninth Circuit

T. C. Docket No. 63623

BAY COUNTIES TITLE GUARANTY COM-
PANY (formerly BAY COUNTIES ES-
CROW COMPANY), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW BY THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Now Comes the above named petitioner by its attorneys, Peart, Baraty and Hassard and Kenneth S. Carey, and petitions the United States Court of Appeals for the Ninth Circuit to review the opinion of the Tax Court of the United States rendered

and entered on April 12, 1960 ordering and deciding that there are deficiencies in petitioner's federal income taxes for the calendar years 1952, 1953 and 1954 of \$2,068.80, \$2,574.30 and \$1,924.71 respectively.

I.

This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The petitioner is Bay Counties Title Guaranty Company, a California corporation.

Said petitioner filed its federal income tax returns for the calendar years in question with the District Director of Internal Revenue, San Francisco, California. Jurisdiction is vested in the United States Court of Appeals for the Ninth Circuit pursuant to Section 7482(b)(1) of the Internal Revenue Code of 1954.

II.

Nature of the Controversy:

The controversy involves the proper determination of petitioner's federal income taxes for the calendar years 1952, 1953 and 1954. During the years 1952-1954 petitioner purchased many preliminary title reports or copies of title insurance poli-

cies. In 1952 petitioner paid \$6,896.00 for such reports or policies, in 1953 \$8,581.00 and in 1954 \$7,534.00. Each report or policy was immediately filed and incorporated in petitioner's plant in much the same manner as any other item of information relating to title. Petitioner claimed the sums expended in the years in question as ordinary and necessary expenses of doing business. The Commissioner disallowed such deductions on the ground that they were capital expenditures. The Tax Court sustained the Commissioner on this contention.

III.

Taxpayer being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Tax Court and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals, Ninth Circuit.

IV.

Petitioner assigns as errors the following findings and conclusions of the Tax Court of the United States:

(a) That the preliminary title reports and old title policies purchased by the petitioner in each taxable year had a useful life beyond the year of purchase which extended until such years as peti-

tioner might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them.

(b) That the future time of use in petitioner's business was problematic and indefinite depending upon when, as, and if the petitioner might be called upon to make abstracts of title to the same pieces of property.

(c) That the old preliminary title reports and old title policies constituted additions and betterments to petitioner's title plant, and the expenditure for them was a non-deductible capital expense.

(d) That the expenditures were not current maintenance expenses within the category of ordinary and necessary business expenses.

Dated: June 30, 1960.

PEART, BARATY & HASSARD,

/s/ By JOSEPH S. ROGERS,

/s/ KENNETH S. CAREY,

Attorneys for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed July 5, 1960.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the documents submitted under this certificate, 1 to 29, inclusive, as called for by the designation, are the original documents of record on file in my office (excepting the original exhibits which are separately certified), and a true copy of the docket entries as they appear in the official docket of my office, in the case docketed at the above number in which the petitioner in this Court has filed a petition for review.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of August, 1960.

[Seal] /s/ HOWARD P. LOCKE,
Clerk of the Court.

The Clerk: Docket No. 63623, Bay Counties Title Guaranty Company.

Mr. Carey: Ready.

The Clerk: Will counsel please state your appearances for the record?

Mr. Carey: Kenneth S. Carey and Joseph S. Rogers for the Petitioner.

Mr. Boyle: Edward H. Boyle and Joseph D. Holmes, Jr., for the Respondent.

The Court: You may proceed, Mr. Carey.

Opening Statement on Behalf of Petitioner

Mr. Carey: If the Court please, this case involves three separate years but the issue or issues involved in each year are identical. In each of 1952, 1953, and 1954, the Petitioner here purchased from various real estate brokers in the City and County of San Francisco preliminary title reports and/or title insurance policies to be used by the Petitioner in its title plant as an aid to searching title. These purchases were made in cash, that is, currency. They totaled in 1952, \$6,896.00. In 1953 there was \$8,581.00, and in 1954, \$7,534.00.

Bay Counties Title Guaranty Company was organized in 1946. It actually commenced business in 1947, early in 1947. During the period from 1947 to January 1, 1952, [3] Bay Counties capitalized all of their abstracting, all of their title information. This is a five-year period. The practice in the

industry is that after a title company has been in active business for five or more years, they are deemed to have a sufficient plant for efficient preparation of title searches for efficient management of their title business. During this five-year period at least, and probably in excess of, \$25,000 was expended by the Bay Counties Title Guaranty Company to bring their title plant to a peak of efficiency.

Now, during this period a number of these preliminary reports and title insurance policies were purchased also and the costs of these were capitalized during this period. Beginning in 1952 the costs of searches, the costs of the daily abstracts, and so forth, were expensed and charged to current operating expenses and so also were the sums here involved.

Now, as I understand, and as I see this case, there are two issues involved and only two issues and they are common to all three years. No. 1: Should these expenditures be capitalized, and No. 2: Were these expenditures disguised payments of commissions through real estate brokers, violative of the Insurance Code of the State of California. As I understand this case, it resolves itself into those two issues.

The Court: Does the Government concede that if these payments are payments for the legitimate acquisition of copies of title policies or other information relating to titles, that [4] they can be expensed?

Mr. Boyle: No, your Honor. We say that those are capital in nature. Do you wish me——

The Court: Well, if the expenses were not exactly what they should be, what is your view about them? They cannot be capitalized either?

Mr. Boyle: Well, we believe the evidence will show that actually they were not purchasing anything.

The Court: What is the answer to my other question?

Mr. Boyle: If they were purchasing something, we think then that the expenditures should be capitalized, that they were not expense items and this was a part of the plant.

The Court: I think you didn't get the point of my second question.

Mr. Boyle: I am sorry.

The Court: From reading the pleadings it appears that the agent has taken the view that these particular payments in each of the taxable years were refunds to brokers and such refunds to brokers violate either a statute here or a code provision or something. Now, supposing the evidence showed that these payments were some sort of rebate. What is your position about the item then as an expense?

Mr. Boyle: That it is not allowable because——

The Court: Allowable as what?

Mr. Boyle: It is not a deductible item because it [5] is in violation of public policy.

The Court: That would be in case they could take a deduction at all. What about capitalizing the item?

Mr. Boyle: If they were not really buying anything and these were pure and simple rebates, as I assumed your question to be, there would be no question of capitalization. It would just be a payment in a year to a real estate broker. They could not advance under any theory of capitalization there.

The Court: Without taking too much time, what is your view about these payments? What does the Government contend the payments are?

Mr. Boyle: First that they were just rebates or kickbacks.

The Court: Enlarge on that. Why do you think they were rebates?

Opening Statement on Behalf of Respondent

Mr. Boyle: This company incorporated in 1946. It commenced business in 1947 and in those early years it made these payments to these real estate brokers without regard to these so-called title policies.

The Court: What for?

Mr. Boyle: To get business. See, they are just a brand new starting corporation and to compete

with the big title companies they had to bring in business. One means of [6] doing it was to pay the brokers to bring the business to them.

The Court: What kind of brokers?

Mr. Boyle: Real estate brokers and agents. Now, if the real estate broker came along with the business and had some kind of a preliminary report or title policy on the policy involved in the transaction that he was bringing into this title company, they would be happy to have that, too, but they were not paying for it. They were paying him 10 per cent of the escrow fee and the total title policy together to bring the business.

Now, in 1949 the big four companies here, California Pacific Title and the other big three, put law into the State Code to prevent this. Well, this corporation apparently did not feel, and the others did not feel, that it had enough teeth so they didn't pay any attention to it. In 1951 the big four did put in provisions which did have teeth and it is still present in the California Insurance Code. At that time they acquired the idea from a title company down in San Mateo that maybe they could get around this by buying these policies and at that time they started doing this.

Now, however, they still pay on a percentage of the escrow fee alone and they will take, under their theory of the case, any title policy or any preliminary title report. That is, it does not have to relate to the property that is in the business at hand. It

can relate to anything and they [7] will buy duplications, get two things on the same property. They have no means of assembling it or identifying it or screening it and they can't even tell today what they did buy. All they can say is they bought something, so we think that they were still basically trying to bring in the business by just making payments to the real estate brokers. But we say secondly that if the Court should find that they started buying something in 1952, what they were buying is still a part of their total plant and must be capitalized because they have not got starters on all the property in San Francisco. Some of the starters—by “starter” I mean a preliminary title report or a title policy issued by some other company—may date back 10 or 15 years or it may be more recent, but what they say it enables them to do is to abstract the title only part of the way and therefore they will rely on someone else's search prior to that.

You see, this corporation does abstract. But it does not issue insurance. It just recommends and another company actually issues the insurance, but we say that the evidence will indicate that what they were doing in our years was the same thing as in former years, in other words, bringing in business.

The Court: What is the statutory provision to which you have reference?

Mr. Boyle: Section 12404 of the Insurance Code. It speaks of prohibited commissions. [8]

“No title insurer, no controlled escrow company, and no underwritten title company shall pay to any

person who is acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or of the prospective owner, lessee or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, or any part of its fees or charges or any other consideration as an inducement for or as compensation on any title insurance business or any escrow or other title business in connection with which a title policy is issued."

Now, there is a criminal penalty, too, for violation. That is Section 12409, in case there is an unlawful rebate.

The Court: What is this section, Section 12404?

Mr. Boyle: Yes, 12404.

Mr. Carey: Of the Insurance Code?

Mr. Boyle: Yes, of the Insurance Code of California.

The Court: And you say this Petitioner is an underwritten title company?

Mr. Boyle: Yes, it is.

The Court: Spell that.

Mr. Boyle: Underwritten, u-n-d-e-r-w-r-i-t-t-e-n.

The Court: Title company?

Mr. Boyle: Title company.

The Court: What is an underwritten title company, Mr. Carey? [9]

Mr. Carey: If the Court please, that is a company that has facilities for making sure of the state of the record title and whether the record title is the proper title, but does not itself issue any title insurance. It will provide the escrow

services but another company of whom this company is an agent actually issues the title insurance policy. In every transaction involving title insurance there are two separate and distinct services provided. There is the escrow service and the title insurance service. Now, the title company or underwritten title company provides the escrow service and in effect guarantees the title, but the actual insurance is written and issued by another company.

The Court: What is the name of the company you work with?

Mr. Carey: Bay Counties Title Guaranty Company.

The Court: I think we might be able to dispose of one matter if I ask this question.

Does the Petitioner know to whom the various payments were made in each of the taxable years which aggregate the totals we have before us?

Mr. Carey: Yes, your Honor, we do.

The Court: How many payments are involved?

Mr. Carey: There are quite a number of payments, if the Court please. Our records show those but there would be probably 20 or 30 payments in a year, or more. [10]

The Court: Have you had those listed? Are they typed out?

Mr. Carey: No, your Honor, they are not.

Mr. Boyle: If your Honor please, we would request permission to be able to see their books now. We might save some time. We have not been able to obtain those books and if we can——

The Court: Mr. Carey, I can't take the time to get that sort of detail by the interrogation method.

Mr. Carey: I understand that.

The Court: Now, you know what the payments were and to whom they were made in each year?

Mr. Carey: Yes, ma'am.

The Court: And after all, one question that has to be decided is: What were these payments?

Mr. Carey: That is correct.

The Court: Unless I can identify individual payments I can't answer the question. I can't decide the question as to what each payment was for. That is perfectly obvious. But perhaps I should mention it because you might think that I would deal with the matter in a general way. No. I will want to know about each payment.

Mr. Carey: If the Court please——

The Court: We are dealing with individual payments. Some might be all right and some might not. The only way I can [11] decide that question is to know about each individual payment.

Well, we are not going to take the time to locate each individual payment and the amount of each payment through the system of interrogation. That would take too long. So I want a typed list of the payee, the date of the payment, the amount of the payment and the total of all the payments, and anything else—why the payment was made, whatever else you have to identify the item.

Now, if you then wish to examine some witnesses about that material, at least I have the material in collected form to use for the purposes of finding

some fact in the case. Now, when can you get that?

Mr. Carey: I think that we can lodge it with the Court——

The Court: It doesn't have to be typed now. If someone will take a pad and pencil and write it up, if you have that.

Now, on the matter of the request of Respondent to look at some material, I don't know what you think about that. Have you stipulated any facts?

Mr. Carey: Yes, your Honor. We were going to lodge those with the Court at this time. The Articles of Incorporation of——

The Court: Let me see these.

Mr. Carey: ——of the Petitioner. The United States [12] would like leave to make copies of that, so——

Mr. Boyle: May I interject at this point, your Honor, with regard to what they are going to provide in the way of listing these payments?

The Court: Yes.

Mr. Boyle: First of all, the stipulation of facts is only general and will help very little.

The Court: That is not unusual.

Mr. Boyle: What the Respondent would like, first of all, there are two books of record. The first shows checks drawn to cash or to Mr. Rolls, the President of the corporation. We would like those checks, that is, the amount and the date, because it will be admitted that Mr. Rolls cashed those checks and took the currency and paid the real estate brokers in currency.

The Court: Is Mr. Rolls going to be one of your witnesses?

Mr. Carey: Yes.

The Court: How many witnesses are you going to have, Mr. Carey?

Mr. Carey: We are going to have four witnesses.

The Court: I understand your suggestion. Now, what is your next suggestion?

Mr. Boyle: The next suggestion relates to the specific point that you were talking to Mr. Carey about. The [13] next record is called a daily ledger and that will show the names of the real estate brokers. It will show two columns of figures, the first being the escrow fee handled by that particular broker and the second column will be the amount paid the broker, so we would like not only the amount paid the broker but also that other column of figures, the total escrow fee, to show—to show the comparison or the relationship between the payments and that fee.

The Court: To see if there is a uniformity?

Mr. Boyle: Yes, a percentage applied.

The Court: I suppose the Petitioner would rather not provide you with that information. Did you subpoena it?

Mr. Boyle: Yes, we have. They are here and we can put it in the hard way. We have not been able to look at it.

The Court: I am going to cut through this right now in this way. We will call Mr. Rolls to the stand right now and we will also ask the Petitioner to produce those books right now.

Now, if those records have been subpoenaed, produce them, please.

Mr. Carey: They are here. I take it the United States is calling Mr. Rolls to the stand?

The Court: I don't know. We just called him, the Commissioner or the Respondent here. You don't have to refer [14] to the Respondent here as the United States. The title of this is Bay Counties Title Guaranty Company against Commissioner.

Mr. Cary: The point I am making——

The Court: If you want to call Mr. Rolls, call him. If Mr. Boyle wants him he can call him.

Mr. Boyle: I would rather do so when our case comes on.

The Court: Now, I am going to—now, I assume that we know and can delay until later some of the background questions that would be asked. Now, the nub and the heart of one of these issues is simply: What were these payments? To whom were they made and why? Now, let's get at that right away because we were here all day yesterday hearing a so-called three-hour case.

Now, I have allowed most of today for this and maybe we can finish it this morning.

Mr. Boyle: If your Honor please, I would request that they go in the proper order. If on the other hand, you wish otherwise, we will be happy to proceed.

The Court: I want to proceed this way. Call Mr. Rolls.

Mr. Boyle: For me to call him?

The Court: Yes, you call him.

Mr. Boyle: Mr. Rolls, will you take the stand?

Whereupon, [15]

JACK M. ROLLS

was called as a witness on behalf of the Respondent and, having been first duly sworn, testified as follows:

The Clerk: State your name and address for the record.

The Witness: My name is Jack M. Rolls, 135 Hayes Street.

The Court: I will ask Mr. Rolls a few questions. Mr. Rolls, be seated, please.

What is your position in the business of the taxpayer here?

The Witness: I am the President of the company, your Honor.

The Court: Are you in charge of the regular records of this concern?

The Witness: Yes.

The Court: Now, one of the questions here is: For what were these payments made? And the Court, in order to save time—you have heard me say this. I want to find out what the details were. Now, I would like to get at that right away and then revert to the usual order because it may be necessary for you to ask someone to write up something or make a detailed schedule. Will you pro-

(Testimony of Jack M. Rolls.)

duce your books and records showing—I guess it would be your daily ledger—showing the payments of the escrow fees and the other amounts [16] paid to brokers during the years 1952, 1953 and 1954, which give rise to the problem in this case.

Also, Mr. Boyle, let me have the income tax returns of the taxpayer, the stipulation of facts as received. There is one exhibit attached which is Articles of Incorporation. That is received. Now, is the Articles of Incorporation supposed to be a taxpayer's exhibit or a government exhibit?

Mr. Boyle: 1-A, your Honor.

The Court: It is just referred to as A in the Stipulation of Facts.

Mr. Boyle: I just signed this this morning. Exhibit 1-A is all right or it could be A but it is attached to the stipulation so it should be 1-A.

The Court: All right. The Certificate of Incorporation is received as Joint Exhibit 1-A in evidence and 1-A may be withdrawn and a copy substituted, whatever copy you want to make.

(Respondent - Petitioner's Exhibit No. 1-A was marked for identification and received in evidence.)

The Court: The Respondent has produced the returns for 1952, 1953 and 1954 and these are received as Exhibit B, the return for 1952, Exhibit C, the return for 1953, and Exhibit D, the return for 1954, with leave to withdraw and substitute photostatic copies as is usually done.

(Respondent's Exhibits B, C, and [17] D, were marked for identification and received in evidence.)

The Court: Now, did the taxpayer deduct in these returns these particular items as separate deductions or did the agent cull them out of some other deduction in his examination?

Mr. Carey: They were deducted as separate deductions, that is, under a separate category.

The Witness: Excuse me, I don't think that they were. They were grouped as a total advertising expense.

The Court: They were included in advertising expense?

The Witness: Yes.

The Court: That is what seems to be said in the Petition. That's right. Well, then, when you have marked those returns I want them back.

Do you know enough about these returns to find out where the advertising expense is in which these amounts might have been included or would your books show it better?

Mr. Boyle: Do you care for me to supply any information on that point?

The Court: Yes.

Mr. Boyle: They will not show it. They are lost in the total of advertising. There would be no way to pick these amounts out.

The Witness: That's what I was getting at. [18]

The Court: What did they deduct for advertising in each of these years?

Mr. Boyle: What we are talking about here,

(Testimony of Jack M. Rolls.)

these payments made to real estate brokers. That is part of the advertising, the only thing.

The Court: All right. I can pass it over.

The 1952 return shows a deduction for advertising expense in the amount of \$7,195.83. Now, apparently there was included in that figure \$6,896.00.

Mr. Boyle: That is correct.

The Court: Well, now, you see why I want to know the figures because the item that is being questioned constitutes most of what is deducted as advertising. That's why I want the figures. It's not too much lost in that. In 1953 Mr. Rolls points out that the deduction for advertising and entertainment is thrown together. It is \$12,236.62, and of that amount \$8,581.00 is being questioned. Then in the return for 1954 they deducted as advertising and entertainment \$12,755.19 and of that \$7,534.00 is being questioned.

Now, Mr. Boyle, what is it that you want to see before we go ahead? Do you want to see some of their accounting records?

Mr. Boyle: No, we want to put into evidence what those accounting records show.

The Court: What do the accounting records show? [19] Your agent has been over them.

Mr. Boyle: That was three or four or five years ago, if your Honor please. We would like to show the manner of payment. There is no question, I take it, that Mr. Rolls will state that he made these payments to these real estate brokers in currency.

Mr. Carey: So stipulated in the stipulation.

(Testimony of Jack M. Rolls.)

Mr. Boyle: That is correct, so stipulated, and we want to show how the currency got into Mr. Rolls' hand. That is, a check drawn by the corporation which Mr. Rolls cashed and then took the currency.

The Court: That would all have to do with method. I suppose you could call Mr. Rolls as your witness or you could cross-examine him about that.

Now, I want to try to save some time. What does your revenue agent's report show? Why should we have to do over again what your revenue agent has done once?

Mr. Boyle: If Mr. Rolls will admit what I have just said, we can eliminate that particular record. If Mr. Rolls will——

The Court: All right. I don't know what he is talking about, but if you get some records I am not going to put them in evidence at this time. I don't want to jeopardize your case at all. I just want to try to save some time and find out where we are going. Then I will see that we proceed [20] properly.

Just step down, please, and go over to the counsel table with those ledger sheets. Let's see what Mr. Boyle is getting at.

Now, Mr. Boyle, what do you want? There are the ledger sheets.

Mr. Boyle: I will have to take a few minutes to have the revenue agent look at this. I have never seen it.

The Court: Where is your revenue agent? Move over, please.

(Testimony of Jack M. Rolls.)

Are you Mr. Holmes?

Mr. Holmes: Yes, your Honor.

The Court: All right. Move over to that other chair, please. Let the revenue agent sit down there. Don't be concerned, Mr. Carey. We will get back to our usual procedure in a few minutes.

What is the revenue agent's name?

Mr. Boyle: Mr. James Compton.

The Court: Mr. Compton, do you have your report with you this morning?

Mr. Compton: Mr. Boyle has it.

The Court: Mr. Boyle has the report. We shouldn't have to go over this, all over again. What are you going to look for? Are you going to look for specific items of payment? Let's find out what you are trying to get at. [21]

The Witness: Your Honor, I could point them out. I know where they are.

The Court: The Petitioner admits that these payments were made in cash, apparently, and the books show the payments. Under what account were these payments entered?

The Witness: Listed under advertising.

The Court: They were listed under advertising and what do you want, Mr. Boyle? Do you want to spot them in the——

Mr. Boyle: What I thought, I would if I could see the books we would have picked these items out and introduced these sheets in evidence. If the Court does not wish for us to go through that, with this particular record, it just shows amounts drawn to either cash or Mr. Rolls or to——

(Testimony of Jack M. Rolls.)

The Witness: Not to me.

Mr. Boyle: But in any event the checks were then cashed by Mr. Rolls, the cash taken and used to pay real estate brokers in these years involved.

The Court: I think all that you would find would be something like this: This is an account in the book under the caption of advertising expense, and Mr. Rolls has a check drawn to cash and cashes the check. The check is in the amount of \$535. Now, an expenditure of \$535 is debited to this account. That is all.

Mr. Carey: I think you will find more than that.

The Court: What else are you going to find?

Mr. Carey: You are going to find in each instance that the check notation is "cost of reports."

The Court: In the explanation?

Mr. Carey: In the explanation.

The Court: Let's see. Those are ledger sheets. There has to be reference to a journal, then.

The Witness: No, they are direct daily entry.

The Court: This sort of inquiry is what I have in mind when I say just give me a typed list of these items. Then nobody has to look through the pages to find them.

Mr. Carey: We will provide that, your Honor. We will provide from the ledger sheets the entry in each instance and we will provide a summary of it in typed form.

The Court: There is no harm in taking a recess for a minute, now that Mr. Boyle for some reason wants to look at those ledger sheets.

(Testimony of Jack M. Rolls.)

The Witness: Your Honor, I was thinking perhaps we could photograph or have copies made of these sheets, these pages which are the records.

The Court: I haven't the time. My time is so short, Mr. Rolls, that I really don't have the time to take 20 ledger sheets—if you took 20 ledger sheets and put a red mark opposite an entry and said, "Well, now, there it is." I wouldn't have the time to look at the 20 sheets and find the [23] 20 red dots, because we have to write findings of fact and I would have to take—it's raw material, and I would have to take it and make up a table and have it typed and I don't want to have to do that. You make up the table and have it typed.

Mr. Carey: We will do that, your Honor.

The Court: We want to know what expenditures total \$6,895.00 and the facts about them. If every one of those items was credited or debited to some particular account, I want it written out, but I will not take the time to put together all the details from your books. In other words, when you get to this point the Tax Court is going audit nothing. The revenue agents audit things and whoever is preparing the case can make summaries and present them to the Court, but the Court has no time to make up tables, schedules, or anything else.

I will give you a few minutes to check whatever you want to there and then we will get back to the usual order of business.

(Short recess.)

(Testimony of Jack M. Rolls.)

The Court: Mr. Carey, when the taxpayer received the—I suppose it was a 30-day letter, you had a conference with the agent here?

Mr. Carey: Yes, we did.

The Court: I suppose you found out how these totals [24] of additions to income were arrived at, the total amount for each year?

Mr. Carey: Yes.

The Court: Now, we have seen during the recess a work sheet of the agent. It was in the nature of a work sheet. He has taken some of the taxpayer's records and put some red figures on them.

Mr. Boyle: Those were the taxpayer's records. They are his records.

The Court: Well, they are the taxpayer's records but in a sense they have become a work sheet of the agent because the agent put some red figures on them.

Mr. Boyle: No, your Honor, no figures on there were put on by the agent. Those were all records kept by the Petitioner in this case.

The Court: All right. Then, they are the taxpayer's notations on his own records. Now, the agent must have totaled some figures because he comes out with additions to income in each of the taxable years of a certain amount. Where are the agent's work papers?

Mr. Boyle: If your Honor please, the agent in auditing those records you refer to took all the payments to real estate brokers and disallowed them. The only record the agent made for his own

(Testimony of Jack M. Rolls.)

purpose, he took over a period of three months in those three years enough down so that he could [25] write his report and therefore state that the amount paid the real estate broker totaled 25 percent of the escrow fee, but no memorandum of the agent is here or has been shown to the Court or anything yet. Those are all the records of the Petitioner that we were looking at.

The Court: So you intend to, during the trial of the case, bring this before the Court and your method would be to ask the taxpayer to produce these accounting records, offer in evidence the accounting records themselves, withdraw them and have them photostated, then ask the Court to audit them and find out if \$6,896.00 equal a certain percentage of something else, and I won't do it.

Mr. Boyle: If your Honor please, I don't think that will be necessary, if we put them in evidence. I think in our briefs——

The Court: I won't wait to have things done in briefs.

Mr. Boyle: There will not be any dispute——

The Court: There may be and I will not wait to have that sort of thing done in briefs. Do it during the trial of the case and then you can put in your brief what has been put into your record of the trial of the case.

Mr. Carey, how much of this do you admit, because this ought to be a fairly cut and dried matter. There were payments made to brokers. They may have been perfectly normal [26] legitimate payments.

(Testimony of Jack M. Rolls.)

Mr. Carey: There were payments made to brokers. There is no question about it.

The Court: And they were, you agree, do you, that there were payments made to brokers in the total amounts for each of these years that have been added to the taxable income?

Mr. Carey: Yes, that is stipulated.

The Court: That you agree to?

Mr. Carey: Yes, ma'am.

The Court: And you also agree that these were charged to advertising expense on the books?

Mr. Carey: For the most part.

The Court: For purposes of this case, I suppose we can say that they were?

Mr. Carey: Yes, your Honor.

The Court: You agree as to the method that was used in making these particular payments to brokers, that they were all made in cash?

Mr. Carey: Yes, your Honor.

The Court: But we don't have the breakdown of any of these amounts. We don't know who the brokers were, we don't know what they are doing, we don't know why you were making the payments?

Mr. Carey: That is correct. [27]

The Court: And we can take a lot of time to make a record on that sort of detail and I propose that we do that without taking a lot of time and without doing it in detail. Now, it's up to you to figure out how to do it and it will have to be done during the trial of the case and not on briefs.

Mr. Boyle: I have this suggestion: If we were

(Testimony of Jack M. Rolls.)

allowed to put those records in evidence, and then by Friday before the Court leaves, the parties will type up the material information on those sheets and then submit that as a typewritten summary.

The Court: You will get to the time for putting in evidence as we proceed. I don't know whether you want to put them in now or not. It would seem to be out of order. I think the best thing for us to do is to let the matter alone for the present time. I have indicated what I will have to have. Petitioner has his own plan of going ahead and so I think we better let you go ahead, Mr. Carey, in the usual way.

Mr. Carey: I would like to call Mr. E. A. Smith, please.

Whereupon,

ELIAS W. SMITH

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows: [28]

The Clerk: State your name and address for the record.

The Witness: Elias W. Smith, 408 South Spring Street, Los Angeles, California.

Direct Examination

Q. (By Mr. Carey): What is your occupation, Mr. Smith?

A. I am in the title insurance business.

Q. By what company are you employed?

(Testimony of Elias W. Smith.)

A. Pacific Coast Title Insurance Company.

Q. What position do you hold?

A. I am Secretary-Treasurer.

Q. How long have you held such position?

A. Since February of 1950.

Q. How long have you been in the title business? A. Ten years.

Q. Are you familiar with title practices of title companies and underwritten title companies, generally, in California? A. Yes, I am.

Q. It is correct, is it not, Mr. Smith, that the Petitioner in this case is an agency of your company? A. That's correct.

The Court: Explain that. In what way? What is the Pacific Coast Title Company? [29]

The Witness: We are the underwriting company, your Honor.

The Court: What is the business of the Pacific Coast—what is the full name of the company?

The Witness: Title Insurance Company.

The Court: What is your business?

The Witness: Issuing title insurance policies, insuring on titles.

The Court: All right. You say you have agents?

The Witness: Yes.

The Court: And this taxpayer is an agent of your company in this area, is that right?

The Witness: Yes, that is true.

The Court: What is the scope of the agency? In what way is this company an agent?

(Testimony of Elias W. Smith.)

The Witness: They have the exclusive agency of issuing our policies in the San Francisco County.

The Court: All right. Then, if a purchaser and seller of real estate comes to them they provide the escrow service, is that right?

The Witness: They conduct the title search and examination and request us to issue our policy of title insurance.

There is an Assistant Secretary of ours within that company to issue that policy. [30]

The Court: What is his name?

The Witness: Mr. Rolls.

The Court: Are any of your records available for that title search?

The Witness: The records for the search and examination are in the offices of Bay Counties Title Guaranty.

The Court: They are a new company. They have been building up a business here?

The Witness: Yes.

The Court: Do you maintain title records?

The Witness: Oh, yes, we do.

The Court: Does Mr. Rolls use some of your title records?

The Witness: No. The records for San Francisco County are retained in San Francisco.

The Court: Those records then that are retained in the office of Bay Counties Title Company, were some of those records obtained from your organization?

The Witness: No, ma'am.

(Testimony of Elias W. Smith.)

The Court: In the first instance?

The Witness: No.

The Court: How long has Pacific Coast Title Insurance Company been in existence?

The Witness: Since 1944.

The Court: So you are a new company here? [31]

The Witness: Yes, we are.

The Court: Go ahead.

Q. (By Mr. Carey): From your experience and knowledge of the title business in California, Mr. Smith, is it a common practice for title companies to purchase preliminary reports or copies of title insurance policies? A. It is.

The Court: Who do you purchase them from?

Q. (By Mr. Carey): From whom are they purchased, Mr. Smith?

A. Realtors, escrow companies.

Q. Wherever they can be obtained?

A. Wherever they can be obtained.

Mr. Boyle: I would like to take this witness on voir dire. He is apparently trying to qualify him as a man qualified to talk about custom.

The Court: Objection overruled.

Q. (By Mr. Carey): Do you know of specific instances where this is done or was done in the years 1952 to 1954, other than Bay Counties?

A. Yes, I do.

Q. And it is done today?

A. That is correct. [32]

Q. Would you tell the Court of those instances that you know about?

(Testimony of Elias W. Smith.)

A. I merely know of other companies which have purchased title starters from people we have mentioned here.

The Court: You used the term "title starters." What is a title starter?

The Witness: That would be the preliminary reports and policies.

Mr. Boyle: I ask that that answer be stricken as hearsay based on hearing from someone else, not of his own personal knowledge.

The Witness: I know it of my personal knowledge.

The Court: Do you know that? All right.

Q. (By Mr. Carey): Is it not a fact, Mr. Smith, that when necessary the Pacific Coast Title buys starters, as you call them, preliminary reports?

A. When necessary, yes.

Q. Your records of your organization in Los Angeles would show this fact, would it not?

A. Yes.

Mr. Boyle: I suggest you let the witness testify.

Mr. Carey: If you want to make an objection, Mr. Boyle, all right. There are proper ways to make an objection. [33]

Q. (By Mr. Carey): Mr. Smith, has your company ever been audited by the Insurance Commission of the State of California?

A. Yes, they have.

Q. How recently?

A. The last audit was completed in July of last year.

(Testimony of Elias W. Smith.)

Q. How frequently are they audited?

A. On an average of every three years. In our case it was five, this last time.

Q. Did I understand your testimony correctly, that your records would show purchase of these preliminary reports? A. That is true.

Q. What agency is it that has jurisdiction over title insurance companies and underwritten title companies? A. The Insurance Department.

Q. Of the State of California?

A. Yes, California.

Q. What comment, if any, was made upon the audit of your company concerning the preliminary reports, the purchase of the preliminary reports?

A. None whatever. They—may I correct that? They did see where they had been purchased and they asked what this was. It was discussed. There was no objection raised by the department.

Q. To your knowledge, have any charges ever been placed against any title insurance company by the Insurance [34] Commissioner because of practices such as you have described?

A. Not to my knowledge.

Q. Do you know of any charges ever having been placed against the Petitioner in this case because of these practices?

A. Not to my knowledge.

Q. Mr. Smith, does your company underwrite several title companies in the State of California.

A. We do.

Q. How many? A. Ten.

(Testimony of Elias W. Smith.)

Q. Other than Bay Counties or including Bay Counties? A. Including Bay Counties.

Q. And these companies, Mr. Smith, you are somewhat familiar with? A. I am.

Q. Do they follow similar practices of buying preliminary reports and title insurance policies when the occasion demands?

A. When necessary, yes.

Q. So that would you say this is a common practice? A. Yes, it is.

Q. Now, suppose, Mr. Smith, that there were an arrangement whereby in a given area—let's say the City and County of San Francisco as the suppositive area—that there were, let's say, five title insurance companies and of the five title insurance companies, four of them got together [35] and they had an agreement which was something like this: Let's say Company A, having a transaction on which it was requested to issue title insurance, in examining the record found that two or three years or five years ago, Insurance Company B had handled a transaction involving that property.

Now, upon request Company B would furnish Company A with a copy of its title insurance policy and a letter of indemnity insuring Company A against any loss sustained by any defects of title not excepted in the policy.

Would this put the person or the company which was not a member of that group to a competitive disadvantage? A. Very definitely, it would.

(Testimony of Elias W. Smith.)

Q. In what way, Mr. Smith?

A. By the exchange of these policies with these other companies that you mentioned, it would save them considerable money in the production of their own policy.

Q. How do you mean, save them money?

A. As far as searching the records.

Q. In their title search it would save a great deal of money?

A. In the title search, yes.

Q. Do you know, Mr. Smith, whether there has been any discussion in the title business concerning the practice of buying title insurance policies or preliminary reports from [36] real estate brokers and whether that violates any provision of any law or regulation of any agency in the State of California?

The Witness: Will you repeat the question?

(Question read.)

A. Not to my knowledge.

Q. (By Mr. Carey): This question has never been raised publicly, to your knowledge?

A. No.

Q. As Secretary-Treasurer of the Pacific Coast Title Company, Mr. Smith, you are familiar with the operating practices and procedures of the companies who are agents for you? A. Yes.

Q. May I ask you: Is it your function to be sort of a watchdog over these people to maintain the integrity of your company? A. Yes.

(Testimony of Elias W. Smith.)

Q. You are familiar with the fact that Petitioner in this case purchased title insurance policies and preliminary reports from brokers?

A. Yes.

Q. You have examined the facts and the evidence in the matter. Have you ever found any evidence that Petitioner [37] in this case was making disguised payments to real estate brokers? A. No.

Mr. Carey: That is all.

Cross Examination

Q. (By Mr. Boyle): How old are you, Mr. Smith? A. Thirty-five.

Q. When did you go to work for Pacific Coast Title Insurance Company?

A. Ten years ago.

Q. You were twenty-five then? A. Yes.

Q. Was that your first introduction to the business?

A. To the title insurance business, yes.

Q. You have never worked for any other company? A. Yes. Not a title company.

Q. That is what I mean.

A. Yes, that is correct.

Q. No other title company. So in testifying as to custom, you were testifying as to what the Pacific Coast Title Insurance Company does, isn't that correct?

A. I am testifying as to what employees who are now employed with us have told me, as well as facts I have found out on my own. [38]

(Testimony of Elias W. Smith.)

Q. What they told you, is that correct?

A. Yes.

Q. Whatever knowledge you have is what someone told you, unless it occurred during your employ with Pacific Coast Title Insurance Company. Is that correct?

A. That's correct.

Q. So you are not in a position to talk about the custom of anyone other than the Pacific Coast Title Insurance Company unless you based your conclusion on what someone told you. Is that right?

A. That's correct.

Q. What documents exist that show the relationship between the Petitioner and the Pacific Coast Title Insurance Company?

Mr. Carey: I object to that on the ground that it is immaterial to any issue before this Court and we are going pretty far afield to show this.

The Court: What is the purpose of that question?

Mr. Boyle: They are called an agent and I wondered what the relationship, if any, was and what watchdog position he might hold, if any. I don't know the relationship between these people. I was wondering what that relationship might be. Now, they have been called an agent.

The Court: Well, instead of asking for any documents, why don't you ask the questions? [39]

Mr. Boyle: I don't believe that this witness would be qualified to answer. I would like to see the instrument.

The Court: He is an officer of the corporation. He ought to be qualified to answer.

(Testimony of Elias W. Smith.)

Mr. Boyle: Yes, your Honor.

Q. (By Mr. Boyle): On what basis do you call Petitioner here an agent of the Pacific Coast Title Insurance Company?

A. It's a contractual relationship.

Q. Contractual, is it in writing?

A. It is.

Q. Do you have the contract with you?

A. No, I do not.

Q. (By the Court): Is "agent" the right word or would "affiliate" be better?

A. I think probably either would be appropriate.

Q. Does this taxpayer pay over any funds to you? A. They do.

Q. What is the basis for their payment of funds?

A. The payments of risk premium on the policy issued.

Q. That is payment of a premium?

A. That's correct.

Q. Why do you call this concern an agent rather than [40] affiliate? Does it sell anything for your concern?

A. Our title insurance policies.

Q. Do you regard it as making sales of your title insurance policies? A. Yes.

Q. And in that respect, then, that is what you mean by agent? A. Yes.

The Court: Go ahead.

(Testimony of Elias W. Smith.)

Q. (By Mr. Boyle): Do you recall the hypothetical question put to you by Mr. Carey regarding five alleged organizations in San Francisco? Would you repeat the material facts of that hypothetical question on which you based your conclusion?

A. Well, as I understand it, the other four companies in San Francisco exchange policies of title insurance. For example, as I recall, one company, Company A, will issue a policy of title insurance. On a subsequent date an order will be placed through another company and the second company can go to this first company and use their policy of title insurance as a basis to begin their title search, rather than searching the records from scratch.

The Court: A pays B something for that?

The Witness: I don't know that. [41]

Q. (By Mr. Boyle): On what do you base that understanding?

Mr. Carey: I beg your pardon. I don't understand that question. I object to it because the question is confusing.

The Court: He means: How does he know that?

Mr. Boyle: How do you know that to be so?

Mr. Carey: I object to the question. It was a hypothetical question and he has not testified that he knows that to be so. The hypothetical question put to him was: Assuming that these facts were so, would this put the fifth company to a competitive disadvantage, and he said yes.

The Court: What are you going to do about your hypothetical question, Mr. Carey?

(Testimony of Elias W. Smith.)

Mr. Carey: We will bring the evidence in, not by this witness, but by other witnesses, that that state of facts exists in the City and County of San Francisco.

The Court: All right.

Mr. Boyle: That is all.

Redirect Examination

Q. (By Mr. Carey): Mr. Smith, during your tenure with the Pacific Coast Title Insurance Company, have you had occasion to meet with other executives of other title companies throughout the State of California? A. Yes, I have. [42]

Q. And discuss title business with them?

A. Yes.

Q. As I recall your testimony, it was that you had some ten agents such as the Petitioner in this case throughout California? A. Yes, we have.

Q. So that your knowledge of the industry is based upon discussions with people throughout the industry, isn't that correct?

A. That's correct.

Q. Is Pacific Coast Title Insurance Company a member of the American Title Association?

A. Yes, we are.

Q. And as a member of that title association——

Mr. Boyle: I object. He is far afield from his direct, far beyond his direct examination.

The Court: Objection overruled.

Q. (By Mr. Carey): As a member of the American Title Association, problems such as this are

(Testimony of Elias W. Smith.)

brought up and discussed in these meetings, is that correct? A. That's correct.

Q. So your knowledge of this business is not based upon what some employee told you, but upon problems discussed by members in the industry?

A. Yes.

Mr. Carey: Thank you. That is all.

The Court: I believe that is all, thank you.

Mr. Carey: Unless Mr. Boyle would like to have him remain, we would like to have Mr. Smith excused. He does not have to catch a plane immediately but he has a plane to catch late this afternoon.

Mr. Boyle: No objection. He can be excused.

The Court: You are excused. Thank you for appearing.

(Witness excused.)

Mr. Carey: I would like to call Mr. Dale Farnow.

Whereupon,

DALE FARNOW

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name and address for the record.

The Witness: Dale Farnow, 2672 Ocean Avenue.

Direct Examination

Q. (By Mr. Carey): What is your occupation?

A. Real estate.

(Testimony of Dale Farnow.)

Q. How long have you been a real estate broker?

A. I have been in the business about 12 years. I have been a broker about five years. [44]

Q. During the years 1952, 1953 and 1954, with whom were you associated?

A. 1952 I was Manager for Green and Kaufman. In 1953 and 1954 I was in business for myself.

Q. Who are Green and Kaufman?

A. Real estate brokers in San Francisco.

Q. During this 12-year period, have you been a broker in the City and County of San Francisco the entire period of time?

A. I was a licensee, not a broker that entire time.

Q. But in San Francisco? A. Right.

Q. Do you have any other connection with the real estate business, Mr. Farnow?

A. What do you mean?

Q. Are you a lecturer in real estate at any place? Do you do any lecturing?

A. Yes, I teach real estate practice at the University of California extension.

Q. How long have you been a lecturer at the University of California School of Extension?

A. Just this semester.

Q. Now, do you, as a real estate broker or licensee, Mr. Farnow, obtain a preliminary report on all transactions that you handle? [45]

A. Yes.

Q. This is a matter of routine?

(Testimony of Dale Farnow.)

A. Right.

The Court: What do you mean by transaction?

Q. (By Mr. Carey): By transaction, Mr. Farnow, I mean any pending or proposed sale or exchange of real property in which you might be the broker or the agent for either the seller or the buyer.

It would be a routine thing for you to obtain a preliminary title report, is that correct?

A. Yes.

The Court: I wish you wouldn't ask leading questions unless you have to. This man shouldn't have to be led.

Q. (By Mr. Carey): What does the preliminary report show insofar as the state of title of the property is concerned, Mr. Farnow?

A. Well, it shows the record title, the owner of record, and the tax situation, the liens against the property in the way of restrictions in the way of loans, the obligations of the present owner.

The Court: From whom do you get such reports?

The Witness: From title insurance companies.

The Court: Do you refer to them as preliminary reports? [46]

The Witness: Yes.

The Court: Suppose Smith is going to buy a piece of improved property, a residence out in the Ingleside area, from a man named Brown, and you represent Smith. Smith is the buyer and Brown is the seller.

(Testimony of Dale Farnow.)

Now, you want to be sure that Smith gets good title, don't you?

The Witness: Yes.

The Court: So just describe the transaction. Tell us what you do, what fees have to be paid, and all of that.

Mr. Carey: May we add one fact to that, your Honor?

The Court: All right.

Mr. Carey: Suppose you had also handled this piece of property in a deal prior to this transaction in question?

The Court: I don't want to assume that. I just assume that he is a broker for Smith who is going to buy a house from Brown. That is all I am going to assume in my question.

We are interested in what you will do preparatory to the closing and what you will do at the closing.

The Witness: In the event that an agreement to purchase is drawn between the two parties, the next step would be to call a title insurance company and ask that they send me a preliminary report of the status of the title. Upon receiving that report I would prepare a deed between the [47] seller and the buyer, using the legal description provided in that report. I would draw up a buyer's and seller's closing statement prorating the taxes as revealed by that preliminary report. I would make the arrangements to have any necessary documents to clear any liens shown in that report which were required to be

(Testimony of Dale Farnow.)

removed, deposited in the escrow. I would use a copy of that preliminary report to supply lender with the legal description, in the event that the lender was going to provide financing in the transaction.

When all these documents and the purchase money was assembled and placed in the escrow, I would instruct the title company to record the transaction with instructions from the buyer and the seller as to their demands, in the escrow, and from this point my responsibility would cease and the title company would record and issue an insurance policy.

The Court: How much do you pay for the preliminary report or don't you pay anything?

The Witness: In most cases we do not pay.

The Court: And the buyer will pay the title insurance company for the policy of title insurance?

The Witness: That's correct.

Mr. Carey: I believe, your Honor, that that may be the practice in San Francisco. In some places it is customary that the seller pay the insurance. In some places it is customary that the buyer pays the insurance. [48]

The Court: Yes, that varies from place to place. In Washington, D. C., the buyer pays for the policy of title insurance, not the seller.

The preliminary report that you have obtained was given by a concern that is in full position to subsequently issue a policy of title insurance?

The Witness: That is correct.

(Testimony of Dale Farnow.)

The Court: And presumably the policy of title insurance is going to purport to cover more than the preliminary report, is it not?

The Witness: It will be a more current coverage than the preliminary report, due to the interim of time from the issuance of the preliminary to the final status.

The Court: Well, the title insurance company is going to guarantee that Brown has a full and complete title that he can convey to Smith?

The Witness: No, the title insurance company is going to issue an insurance policy guaranteeing that the purchaser, Smith, has title to the property subject to certain conditions and naturally in doing so, they have had to ascertain that the original owner had the right to convey and did so in good title, but the insurance is to the buyer.

The Court: All right, it amounts to the same thing. The title company has to guarantee that there was good title to be passed along, is what the purpose of it is? [49]

The Witness: Yes.

The Court: In order to be able to make that guarantee they have to know something about the record of that property long before Smith was an owner. He is the seller in my hypothetical case, but the title company has to—presumably has a record going away back, isn't that right?

The Witness: To my knowledge this would be true. As I understand the title business, I am not an authority on it at all. They can insure title from

(Testimony of Dale Farnow.)

previous insurance which would eliminate the necessity of their actually abstracting the title back to the first record. In the event that a title insurance policy had been issued on the property for the previous owner, they could simply take the chain of title from that policy. That is my understanding, and insure it.

The Court: From the policy held by the previous owner?

The Witness: Yes.

The Court: Regardless of who issued the policy to the previous owner?

The Witness: This would depend upon the individual title company, and their interpretation of that policy, whether they wanted to. I simply say that I understood that they could do this and that they do it from time to time. We are occasionally asked in the real estate business if we can supply a title company with the previous insurance policy, if [50] the owner would supply it. For what purposes, I only imagine for the purpose of abstracting from that point on.

The Court: All right. Now, what is your next question?

Q. (By Mr. Carey): Mr. Farnow, are you acquainted with the Bay Counties Title Guaranty Company? A. Yes.

Q. Have you ever had any business transactions with them? A. Yes.

Q. Have you ever sold any preliminary reports or title insurance policies to them? A. Yes.

(Testimony of Dale Farnow.)

The Court: Wait a minute. Have you ever sold——

Mr. Carey: Yes, your Honor.

The Court: ——any preliminary policies to them?

Mr. Carey: This would be preliminary reports.

The Court: And you say you have?

The Witness: Yes.

The Court: I understand you are a real estate broker?

The Witness: That is correct.

The Court: I would understand from that that you handle sales and purchases of real estate? [51]

The Witness: That is correct.

The Court: Where do you get information, how do you get into the business of selling preliminary reports?

Mr. Carey: If the Court please, there is no testimony that he is in that business.

The Court: I am asking him that.

Mr. Carey: He gets them when the transaction comes into his office.

The Court: He hasn't testified and don't you testify for him, Mr. Carey.

Mr. Carey: I will take exception to that, if the Court please, and ask that the record show and I am asking that the record be marked to Mr. Farnow's testimony, that he has so testified.

The Court: The record will show whether he testified to that effect, but my recollection is that he has not so testified and it may be that there is a

(Testimony of Dale Farnow.)

difference of opinion between us and I certainly am going to clear the matter up.

Do you sell preliminary reports to other concerns? I don't know what to call this concern, Bay Counties Title Company. It doesn't appear to be in a position to insure titles. I don't know what they are, an escrow agent or what, but are there other concerns who are in business like the Bay Counties Title Company? [52]

The Witness: Well, here in San Francisco, to my knowledge, Bay Counties is the only escrow agent issuing insurance through an insurance company. I believe all the other insurance companies are in themselves insurance companies.

Q. (By the Court): Do you provide other insurance companies here with preliminary reports?

A. I never have, no.

Q. Bay Counties Title Company is the only company you have furnished with preliminary reports?

A. That is correct.

Q. Where would you get these preliminary reports?

A. Both preliminary reports and title insurance policies. In the event that——

Q. You have sold them both preliminary reports and title insurance?

A. Copies of title insurance policies.

Q. You would make copies in your office?

A. No. Copies held by either the owner of the property, the owner with whom I am dealing, or by

(Testimony of Dale Farnow.)

a second lien or first lien holder on the property, had a copy of the insurance policy.

Q. Who was willing to give it up?

A. Who was willing to give it up at the time of the pending sale in order to expedite the sale. I had learned that by providing this information to Bay Counties, I could expect [53] a much quicker preliminary report from them because the information provided in either a previous preliminary report or previously issued title insurance policy aided them in preparing their preliminary report for me.

Q. Well, it would be probably incorrect to say that you are in the business of providing people with preliminary reports because you have just done that in dealing with Bay Counties?

A. I believe it would be incorrect to say that I am in that business. I have only done that occasionally for Bay Counties, that's all.

Q. Mr. Carey has indicated in some way, by some question or some comment, that you would be able to furnish a preliminary report only if you had had a transaction in your office involving that particular piece of property at some previous time. Would that necessarily be so or what?

A. I am not in a position to abstract title at all from the County Records. The only time that I would have information would be either from a preliminary report issued by some insurance company which was in my possession or a title insurance report issued by some company that was in my possession.

(Testimony of Dale Farnow.)

Q. Well, supposing a piece of property out on Green Street near Fillmore that had an address of 3527—just so that we have an address of a piece of property—is on the market [54] and the people who are parties to that transaction go into Bay Counties Title Company. Now, you are not a broker in it at all. Might Bay Counties Title call you and ask you if you had any information about 3527 Green Street?

A. They might. It would be conceivable. I don't recall that they ever have.

Q. Supposing Bay Counties had no transaction on hand before them but they happened to know that at one time, or they might ask you: "Do you have any preliminary reports or copies of policies on properties that you could make available to us anywhere?"

Have they ever done that?

A. Yes. Have they ever asked me if I had preliminary reports on certain properties which I could supply them? Yes.

Q. Would you know why they were asking you for it?

A. I presume to aid them in making a current search on the property.

Q. Might it be to aid them in building up records?

A. Yes, I classified that in my interpretation as the same thing.

Q. How much do you charge for that kind of service?

(Testimony of Dale Farnow.)

A. I have never charged Bay Counties any specific fee. This is not a service for providing these reports. I have never charged them any specific fee. They have paid me but I have never issued a bill for any of these things. [55]

Q. What have they paid you?

A. The exact amounts I can't say. I don't remember. I never received from Bay Counties at any time a specific payment for a specific preliminary report. I provided them with several of them and they have used what they could.

Q. You provided them with what?

A. With several over a period of years, a great many actually.

Q. Were you always paid the same amount?

A. No.

Q. Did you know on what basis the amount you were paid was computed?

A. No, I do not.

Q. Did you ever ask?

A. No, I didn't.

Q. About how much would a payment amount to?

A. Well, I was in the habit of only collecting from Bay Counties for payment for my policies possibly once every six months.

Q. About how much would a payment amount to?

A. \$60, \$90, something like that.

Q. Would that be for one report or for several?

A. For several. Since I knew that Bay Counties used these reports and they were of advantage to them, every time I ordered a preliminary search or if I had a previous preliminary [56] report, I auto-

(Testimony of Dale Farnow.)

matically sent it to them. If they needed it or used it I never knew. If I had a title insurance policy from a previous transaction I sent it to them. Whether they used it or not, I didn't know.

Q. Was that because you like them? Why did you do it?

A. Because first of all, I appreciated the recompense and secondly because I knew that it would aid them in getting my preliminary back to me as quickly as possible, which was to my interest.

Q. You mean at some future time?

A. No. What I was referring to there, in the event that I made a transaction on a given piece of property and I had in my possession either the previous title insurance policy or a previous preliminary report, I would immediately send it to Bay Counties requesting a current preliminary and providing them with the old one.

Q. That is something other than we are discussing now. That would have to do with a particular transaction in which you are acting as a broker?

A. Correct.

Q. We are talking about your providing preliminary reports where there was no particular transaction pending.

A. Yes. That is correct. I have done that.

The Court: All right, Mr. Carey. [57]

Q. (By Mr. Carey): Which other title insurance companies in San Francisco have ever offered to buy any reports from you, Mr. Farnow?

A. None.

(Testimony of Dale Farnow.)

Q. Do you know of any reason why they are not interested in purchasing reports from you?

A. It would only be my own supposition. Possibly they are older establishments, and it is not necessary for them to do so, but they have never approached me and I have never asked them if they would be interested either.

Mr. Carey: I have no further questions.

Cross Examination

Q. (By Mr. Boyle): Mr. Farnow, from whom do you generally obtain these preliminary title reports that you say you asked for when you have a deal pending?

A. From various title insurance companies here in San Francisco.

Q. For instance, have you ever asked California Pacific Title Insurance? A. Yes.

Q. When they issue this, do they know who the buyer or the seller might be in that case?

A. When they issue the preliminary report?

Q. To you, yes. [58]

A. They naturally know—presume the seller is the man of record, that they will provide the name to me as the legal owner.

Q. I mean do you give them the name?

A. Yes.

Q. Suppose you represent the buyer, would you give them the buyer's name?

A. I have never represented a buyer since I have been in the real estate business.

(Testimony of Dale Farnow.)

Q. You do give them the seller's name?

A. Yes.

Q. You do not pay for that preliminary title report, though?

A. It could be. I have paid for them, yes.

Q. If you take the escrow business back to that California Pacific Title Insurance Company, they would be paid then, would they not?

A. In the event that the transaction for which they issued the preliminary report was negotiated through their office and eventually a policy of title insurance issued, there would be no charge for the preliminary report. It is presumed that this was——

Q. But they would charge for the escrow service?

A. They would charge for the issuance of the new title insurance policy. [59]

Q. Now, suppose you do not go back to them with this transaction but go to Bay Counties?

A. Yes.

Q. Who pays for that preliminary report then?

A. If I did such a thing I have no doubt whatsoever that they would send me a bill for the preliminary report.

Q. Oh, you have never done that?

A. No, I don't usually ask one company to give me a preliminary and then switch it to some other company, willy-nilly. Occasionally this happens through things beyond our control. Perhaps a lender requests a certain specific insurer but in that event we call the previous company and tell them

(Testimony of Dale Farnow.)

we are sorry that the preliminary was issued and we can use it. The custom is for them to say, "Well, that's all right," but they could send me a bill.

Q. Well, in that case, if that ever happened—did that ever happen to you?

A. Yes, that has happened.

Q. When that happened was it—was either the buyer or the seller charged for that preliminary report?

A. You are asking me if I can remember one specific case where a buyer or seller was charged? Yes.

Q. Who then kept that profit? It did not go back to the title company that issued the preliminary report. Who kept that? [60]

A. I misunderstood your question. I understood you to say that the company that issued the title report charged for it and was the buyer or seller charged, and if that is the case whoever was charged for it, the buyer or the seller, that fee was naturally paid to whoever issued the preliminary report.

Q. I was asking about the case where you obtained this preliminary report and you did not take the transaction back to the title company that issued the preliminary report? A. Yes.

Q. And you did not pay for that preliminary report? A. Yes.

Q. Now, in that case who kept the profit from the preliminary report?

A. In that case there would be none.

(Testimony of Dale Farnow.)

Q. You would not charge the buyer or the seller, is that right? A. That's right.

Q. How many preliminary title reports or title policies did you turn over to Bay Counties in 1952?

A. In 1952 I was Manager for Green and Kaufman and we were handling at that time an average of around 300 transactions a year. Bay Counties came in and went through our files and took such preliminaries as they wanted to use and I have no idea how many. [61]

Q. Do you know how they were paid for them?

A. At that time Green and Kaufman was not paid. We were not paid for those, to my knowledge.

Q. That was 1952? A. Correct.

Q. How about 1953?

A. I was in business for myself. I provided them with a copy of every search, provided I still had another copy for my own records.

Q. When were you in business for yourself, Mr. Farnow? A. 1953.

Q. Who with?

A. A gentleman by the name of Harry S. Brown, it was a partnership, Brown and Farnow.

Q. Were you in business in October of 1952?

A. I couldn't recall for sure.

Q. Well, I will refresh your recollection. I have a note here which says that in October, 1952, in an escrow transaction with Bay Counties Title in which the total escrow fee was \$34.50, you received \$9. Do you remember that?

(Testimony of Dale Farnow.)

A. No, I do not. If it was in October of 1952 I would presume then at that time I had already started my own business with Mr. Brown.

Q. In March of 1953 it shows you had a transaction with the Petitioner and the total escrow fee was \$498.00 and you [62] received \$124. Do you recall that?

A. No, I have no recollection whatsoever.

Q. How were you generally paid, in currency?

A. I was never paid on any one transaction at any time.

Q. Did you ever receive any money from Bay Counties Title? A. Yes.

Q. How was it paid to you? A. In cash.

Q. By whom? A. By Mr. Rolls.

Q. Would you come personally to his office or would he come to you personally or was it in the mail or in what manner was it paid?

A. No, I'd walk into his office. I conduct most of my business with the title companies by mail and I very seldom go into a title company. I would go into Bay Counties possibly once every three months at the outside, at which time Mr. Rolls would simply hand me an envelope with some cash and say that this was in payment for the searches I sent them.

Mr. Boyle: That is all.

Mr. Carey: No further questions.

Unless counsel would object, we would ask that Mr. Farnow be excused.

The Court: He hasn't finished. [63]

Mr. Boyle: That is all, your Honor.

(Testimony of Dale Farnow.)

The Court: That is all.

Mr. Carey: We will ask that he be excused unless they have some further questions.

The Court: May this witness be excused?

Mr. Boyle: Yes, your Honor.

(Witness excused.)

Mr. Carey: May we take a recess now until 2:00 o'clock before we call Mr. Rolls, or 1:30 or 1:00 o'clock?

The Court: This takes care of two witnesses. You said you were going to have four.

Mr. Carey: The other two witnesses will take a little more time. I wanted to call Mr. Rolls as my next witness.

The Court: Ordinarily I don't take two hours for lunch. I have to be finished with the trial of this case today.

Mr. Carey: Whenever you want to reconvene, it would be all right, but I would like to take the noon recess at this time, whatever length it may be.

The Court: Yes. Well, if we come back at 1:00 o'clock when will you be finished?

Mr. Carey: I would assume that we could be finished by 2:30 or 3:00 o'clock at the latest.

The Court: You would end your case? [64]

Mr. Carey: Yes, your Honor.

The Court: And are you going to call a witness? How long are you going to take with your case?

Mr. Boyle: Well, my witnesses were talking with Mr. Rogers and they have changed their testimony so——

Mr. Rogers: That is a highly improper remark, Mr. Boyle, and you know it, by inference and otherwise.

Mr. Boyle: These witnesses——

Mr. Carey: Let's have the witnesses brought into Court. There are a number of real estate brokers under subpoena by the United States. If they are not called we ask the Court to order them in. We want them as witnesses.

Mr. Boyle: Were those witnesses talking to you within the last few days?

Mr. Rogers: Not within the last few days. Wait a minute, I am not under oath. If you want to put me under oath so that this record is complete as to my conversation with those witnesses——

Mr. Boyle: Let's just find out.

Mr. Rogers: Absolutely, yes. I talk to every witness when I have a case.

Mr. Boyle: I am not going to call any witnesses. I had arranged to call them but they called me back on the phone and now I can't use them. I think it was highly unethical for them to go and talk to the witnesses. [65]

Mr. Rogers: Counsel has a right to talk to prospective witnesses.

Mr. Boyle: Yes.

Mr. Rogers: Have you talked to Mr. Compton? I have talked to Mr. Compton. We didn't call the witnesses, Mr. Boyle.

Mr. Boyle: No, I called them. That's the strange part.

Mr. Rogers: I have every right to go and talk to any witness. I will defer to the Court's judgment in this matter.

Mr. Boyle: I have no witnesses. All I will have is cross-examination of Mr. Rolls and whatever other witnesses they have, so I presume that I can finish—if they are figuring on finishing at 3:00 o'clock I could finish in two hours.

Mr. Carey: Then I will ask that the subpoenas that have been obtained by Mr. Boyle for these other real estate brokers, that the Court order these witnesses brought in because we want them on the stand. We are only producing one broker, a typical broker, if the Court please. The revenue agent in this case had a list of a number—I don't know whether he had all the brokers—so that Mr. Boyle had an opportunity to interview these people to find out whether there were any improper fee arrangements. Apparently Mr. Boyle [66] found out that there were not so he is not calling them. I think that the Court is entitled to hear these witnesses and to judge for the Court's self whether or not there was any improper tampering with witnesses as has been accused here by Mr. Boyle.

The Court: I don't know who is subpoenaed. We have a system in the Court now, under which our forms of subpoena are obtained by counsel and we don't know who has been subpoenaed. I don't have any copies of subpoenas here. Do you have any copies of subpoenas?

The Clerk: We don't keep copies any more, your Honor.

The Court: Now, if you want to subpoena any witnesses you go ahead and subpoena them. If you want to call any witnesses go ahead and call them.

Mr. Carey: Then my next witness, if it please the Court, will be Mr. Boyle, because we are going to get to the bottom of this witness tampering charge right here and now.

The Court: I don't think we are going to take time to go into that although it was very annoying to you, Mr. Carey.

Mr. Rogers: Very annoying to me, too.

The Court: To have the statement made in that way, but I am going to proceed here with this case and I am not going to take up time to go into that matter at all. [67]

I don't know who Mr. Boyle has subpoenaed and if you want to call any more witnesses this afternoon, you may do so.

It is about 12:00 o'clock and we will recess until 1:00 o'clock.

(Whereupon, the hearing in this matter was adjourned until 1:00 o'clock p.m. of the same day.) [68]

Afternoon Session

Mr. Boyle: If the Court please, at the close of this morning's session the Court asked whether the Respondent intended to call any witnesses and I stated no and then I made some gratuitous remarks

about why I did not intend to call those witnesses. I wish to have the statement stricken from the record and confined merely to the fact that the Respondent does not intend to call any witnesses.

The Court: That is a good thing to do.

Now, Mr. Carey, do you want to proceed?

Mr. Carey: Yes, your Honor. I would like to call Mr. J. M. Rolls.

The Court: Mr. Rolls.

The Clerk: He has been sworn this morning.

Whereupon,

JACK M. ROLLS

was called as a witness on behalf of the Petitioner and, having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Hr. Carey): What is your present position, Mr. Rolls?

A. I am President of the Bay Counties Title Guaranty Company.

Q. How long have you been President?

A. Since its incorporation, July 3, 1946. [69]

Q. How long have you been in the title business?

A. Since October, 1935.

Q. With whom were you associated prior to the time that you became associated with Bay Counties?

A. City Title Insurance Company.

Q. All the period from 1935 to 1946, you were with City Title? A. Yes.

(Testimony of Jack M. Rolls.)

Q. In what capacity were you employed by City Title? A. When I left?

Q. During the 11 years that you were employed there?

A. I went completely through the ropes, from the ground up to the point of being an escrow officer at the time I left.

Q. Mr. Rolls, are you familiar with the contents of a typical title plant of a typical title company?

A. Yes, I am.

Q. Would you describe to the Court of what a typical title plant consists?

A. A typical title plant consists of a gathering together of the recordings, daily recordings affecting real property, affecting the names of individuals, in turn segregating that information according to the names of individuals alphabetically in a code system perhaps as to property, segregating it individually as to particular pieces of property that are involved, and that basically is what a title [70] plant involves, together with maps and necessary paraphernalia to locate those pieces of property.

Q. Did Bay Counties Title Guaranty Company have such a title plant as of January 1, 1952?

A. Yes, we did.

Q. As of January 1, 1952, Mr. Rolls, did you have a book of abstracts and recorded instruments?

A. Yes, we did.

Q. Did you have lot books covering every lot in the City and County of San Francisco?

A. Yes, we did.

(Testimony of Jack M. Rolls.)

Q. Did you have a set of general indices?

A. Yes.

Q. What maps, if any, did you have at that time?

A. Well, they are what we call our arbitrary maps. It's for the purpose of locating the various documents that are recorded affecting real property. They covered every piece of property in the city.

Q. What tax records——

Mr. Boyle: Would you repeat that last answer? They covered every——

The Witness: Lot and parcel of property in the City and County of San Francisco.

Q. (By Mr. Carey): What tax records, if any, did you have, Mr. Rolls? [71]

A. We had traffic records of the tax office or the tax assessor's ownership records back to 1938.

Q. Would that be from 1938 to 1952?

A. To 1948.

Q. What other record or information did you have that was of value to you in title abstracting on January 1, 1952?

A. We had a complete set of Edwards Abstracts.

Your Honor, do you know what Edwards Abstracts are?

The Court: No, I don't. That is all right for you to make that inquiry. Tell us what Edwards Abstracts are.

The Witness: We might call it a magazine or a publication put out by the Recorder Printing and

(Testimony of Jack M. Rolls.)

Publishing Company, which prints each day the entire number of recordings by name, document, location of property, all of the documents that have been recorded affecting real property. They also publish the new suits that are filed involving individuals, anything to do with parties involved in legal actions, bankruptcies, Federal actions, and we had a complete set of those from 19 — well, clear back to 1908.

Q. (By Mr. Carey): Did you have any probate records?

A. This Edwards Abstracts does contain that particular information, yes.

Q. What information do you mean, in the sense of probate records? [72]

A. Going back to 1908, that is all contained in these Edwards Abstracts. Subsequent to January of 1947 we had abstracts of our own right, on our own volition or own work, the information as to divorce actions, probates, judgments, insanities.

Q. During what period of time, Mr. Rolls, had you accumulated this plant or this information that you have just described?

A. During the period of January 1947, to January 1952.

Q. During this period of time, January 1947, to January 1, 1952, accountingwise, how were the expenditures for acquiring this information treated by Bay Counties Title Guaranty.

A. They were capitalized on the basis of setting up as a title plant.

(Testimony of Jack M. Rolls.)

Q. Taxwise how were they treated?

A. Taxes were paid on the capitalization.

Q. What, if any, of these expenditures during this five-year period were taken as deductions?

A. None. May I point something out?

Q. Yes.

A. In connection with title plants, your Honor, I think Mr. Bass, just before you came in, was discussing the fact or the relationship of title insurance, and if he had enough money or anyone has enough money to obtain and qualify as a [73] title insurer in the State of California, there is no requirement under the Insurance Code that that title insurer have a title plant.

We are, as you probably have understood so far an underwritten title company. We have our own title plant which we have established. We in turn use that together with the official records of the Recorder's Office for the purpose of making searches of title. In turn, we are the authorized issuing agency for Pacific Coast Title Insurance Company and issue their policies through our office over an Assistant Secretary's signature, I being one of them and there being another one in the office, too.

I'd like to point out, though, as a prerequisite for establishing a title plant, there is none needed actually. As long as there are competent people who are doing the abstracting and searching there is no requirement under the Insurance Code that any policy of title insurance issued be based on any title plant by either the title insurer or the title com-

(Testimony of Jack M. Rolls.)

pany, so that our act of capitalizing this particular item of a title plant was voluntary on our part and also had a salutary effect against our competition in this respect, that when we first started in business they gave us six months to go and they said, "They don't have a title plant."

So we in turn capitalized that so that we could show it on our books and on our statements, that we had a [74] title plant to offset the competitive claim that we did not have a title plant, which in turn helped us in obtaining business, of course, through lending institutions. In other words, you can say that you have got a title plant but unless they see it in black and white on the financial statement they wouldn't believe it.

Q. Would it be correct to say, Mr. Rolls, that as of January 1, 1952, your records would show the record title of every piece of property in the City and County of San Francisco?

A. Generally speaking, yes. There are some pieces of property, of course, of which there are no records. Of course, they are very few and far between.

Q. For all practical purposes?

A. For all practical purposes, yes.

Q. Would it be correct to say that as of January 1, 1952, you had records to show every transaction of record affecting title to real property in the City and County of San Francisco for a period in excess of five years? A. Yes.

(Testimony of Jack M. Rolls.)

Q. Approximately how far back would those records go?

A. As I say, we had these records of the Edwards Abstract, going back to 1908.

Q. So you had in your possession information concerning every transaction of record in the City and County of San [75] Francisco back to 1908?

A. Yes.

Q. Mr. Rolls, during the years in question how much did you pay your abstractors?

A. Well, that would vary, of course, depending on how much you could get, but a good abstractor was paid about \$450 a month.

Q. Is that a 35 or 40 hour week or what?

A. It's normally a 37 and a half hour week.

Q. Mr. Rolls, would you describe the mechanics of a typical transaction going through Bay Counties?

A. First of course, the order is placed by someone, either an individual lending institution, real estate broker, and that in turn is processed by going to our tract indices, locate it as to the property, by using our arbitrary system which is assigning a lot and block number to each particular piece of property in the City and County of San Francisco, going to the information that we have on file in our card system as to this lot and block, checking to see first of all if we have a starter, your Honor, one of these preliminary reports from which we can start. Providing we do have a starter we can begin at that particular point and carry forward, obtain-

(Testimony of Jack M. Rolls.)

ing the information from our title plant, having it rechecked and verified at the Hall of Records, getting information as to the names for Court actions and matters [76] involving an individual himself that in turn affect his ownership of the real property. That information is gathered together and then is turned over to what is called an Examiner. He goes through the records that we have assembled or the searcher has assembled and renders what is called an opinion, which in turn is typed and is called a preliminary report of title.

That is sent out to the broker, the lending institution or whoever is interested in the particular piece of property. Subsequently documents are deposited in the escrow, either documents to clear the title to the property or documents for the assuming of existing loans or perhaps new loans, the deed, the seller's instructions, buyer's instructions, funds, and all of the necessary items that go to make what is called the completed and closed escrow. When that particular time occurs the documents that are to be recorded are recorded. The monies are paid out, the policy of title insurance is issued insuring the new purchaser or new lender, whichever the case may be, and the transaction is considered closed.

The Court: How many people do you have in your office here?

The Witness: We have 34.

The Court: How many Examiners and how many——

(Testimony of Jack M. Rolls.)

The Witness: We have two Examiners. We have three [77] Searchers and then our general indices, there are three in our general indices section.

Q. (By Mr. Carey): How many of these individual employees did you have when you first started in business?

A. We started out—well, when we started to write title insurance there were four of us.

The Court: And one other thing, just for the record. The Recorder to which you refer is the legal newspaper——

The Witness: As to this——

The Court: It is the Law Journal here in San Francisco.

Mr. Carey: Yes, the Recorder Printing and Publishing Company prints the Recorder, a legal newspaper.

The Court: It is the legal newspaper here like the Law Journal in New York City.

Mr. Carey: That is correct.

Q. (By Mr. Carey): Mr. Rolls, I hand you a paper. Would you tell us what that is, Mr. Rolls?

A. That is a work sheet for a preliminary report of title.

Mr. Carey: Before Mr. Rolls goes any further, I would like to have that marked as Petitioner's Exhibit 2 for [78] identification.

The Clerk: Petitioner's 2 for identification.

(Petitioner's Exhibit No. 2 was marked for identification.)

(Testimony of Jack M. Rolls.)

Q. (By Mr. Carey): Mr. Rolls, would you tell us what that consists of?

A. It consists—the outside sheet is the examiner's report, his opinion of the title.

Mr. Carey: Your Honor, I have an extra copy if you want to look at this.

The Witness: Those are photographic copies.

The Court: Go ahead.

The Witness: The outside is the examiner's opinion of the title, and the second sheet is labeled "Chain Sheet"—or I think it's torn off there, your Honor, but it's called our chain sheet which sets forth, in this particular case, a starter which we had for the TI & G, which is Title Insurance and Guaranty Report. It says restrictions, and then it says the recording of a deed to Gaugler to Walsh, a deed of trust from Walsh to the Prudential, and down at the bottom, an Incomp., Agnes Walsh, dated such-and-such a date. The second sheet, underneath that, is an abstract of the deed from Gaugler to Walsh and an abstract of the deed of trust from Gaugler to Walsh. In each case the description says "Same as TI & G report." The last item on the sheet is a copy of the Title Insurance and Guaranty Company preliminary [79] report of title, which is dated March 29, 1947.

Q. (By Mr. Carey): Mr. Rolls, from this particular document—or first of all, before I ask that question, from whence did this document come?

A. Which, you mean this?

Q. Yes, this package.

(Testimony of Jack M. Rolls.)

A. This package came from one of our files, No. 14109.

Q. From your records? A. Right.

Q. That you kept of this particular transaction.

Mr. Rolls, would you point out to the Court what, if anything, was utilized in regard to the TI & G preliminary report which is attached to that, what was done with that report?

A. It was used as a basis or a starter for the search of title, beginning, as you can see on the chain sheet, your Honor, that we started—it says at the top of the sheet, “See TI & G report,” and then the subsequent document was the document recorded by the Title Insurance and Guaranty. That’s the little notation over on the righthand column where it says, “Remarks.”

The revenue stamps were affixed to the deed and the letters “TI & G” means that the Title Insurance and Guaranty Company recorded those documents.

Q. Would you describe this as an unusual case in your office or a typical one where a preliminary report is involved?

A. It would depend on the time.

Q. Time of what, Mr. Rolls?

A. If we did not have a starter sheet or a starter preliminary report here, then we would have to go back on the records to either the date of the filed map, which according to California law is the clear—title has to be clear title as of recording of a filed map, or go back of that to 1906 which was the be-

(Testimony of Jack M. Rolls.)

ginning of our records or reestablishment of our records here in San Francisco.

The Court: Do you have the Torrens System here in San Francisco?

The Witness: No, we don't.

Mr. Rogers: Nowhere in California.

The Witness: Yes, there is the system. However, it is defunct.

Mr. Rogers: In Los Angeles they used to have it. They did have the system but now it is optional and title companies in Los Angeles have succeeded, and we had something to do with that, in trying to eliminate it. It will take ten years but it will be eliminated entirely .

The Court: I see. Just so that we get the real point of your having the witness describe Exhibit 2 for identification, now, what do you want to bring out by 2 for [81] identification? Do you want to bring out that a preliminary report was used?

Mr. Carey: Yes, your Honor.

The Court: And that preliminary report would be Title Insurance and Guaranty report?

Mr. Carey: That is correct, and further——

The Court: There is a number on the report.

Mr. Carey: Yes.

The Court: The point is: Where did they get the report?

Mr. Carey: This will come out later, your Honor.

The Court: All right.

Mr. Carey: But for the purpose here I would like to offer this as Petitioner's Exhibit No. 2.

(Testimony of Jack M. Rolls.)

The Court: If there is no objection, 2 is received in evidence.

(Petitioner's Exhibit No. 2 was received in evidence.)

The Witness: Could those copies be put in?

Mr. Carey: We would like leave to file the original and remove it and substitute a copy.

The Court: You may substitute a copy.

Is that the copy you want to withdraw?

Mr. Carey: Yes. We would like to withdraw that one and substitute another one. [82]

The Court: Let him mark the copy that you are going to give us. They are both on yellow paper so it's hard to see which is the copy.

Mr. Carey: I would like to have this one marked as Petitioner's No. 3.

The Court: Which way are you going to do it. Don't do it that way.

Mr. Boyle, supposing you look at these and see if we can have the copies offered in evidence because it takes up too much time to mark the original and substitute the copy.

Mr. Boyle: Are these all the same?

Mr. Carey: Yes.

The Court: What process do you use in making those copies?

The Witness: Those are recordak copies.

The Court: You have the originals here?

Mr. Carey: Yes, your Honor.

The Court: You can have the Clerk mark both the original and the copy, if you want to, but leave

(Testimony of Jack M. Rolls.)

with us the copy and get them both marked at the same time, and then if the Respondent wants to check them later he will have the exhibit number on the original that he can go by.

Now, you probably have two or three of those that you want to mark, one as 3 for identification?

Mr. Carey: Yes, your Honor.

The Court: With another one which would be 4 for identification?

Mr. Carey: No, your Honor. We just have the two.

The Court: Mr. Boyle can look at that now.

(Petitioner's Exhibit No. 3 was marked for identification.)

The Court: Mr. Carey, this is going to be another example of the same thing and we are going to have to take a recess for a minute. We don't have to leave the room but before we go on to 3 for identification, I want to take up a little matter that will just take a few minutes. You may step down, if you would like to, Mr. Rolls.

(Short recess.)

The Court: Just before we took the recess, counsel wanted to see Exhibit 3 marked for identification.

Mr. Carey: Yes, your Honor.

The Court: And I guess that is your own copy?

The Witness: I have mine.

The Court: All right. Will you proceed with that now?

(Testimony of Jack M. Rolls.)

Q. (By Mr. Carey): Mr. Rolls, would you describe what this Petitioner's Exhibit 3 for identification is?

A. Again this is the gathering together of the information [84] of a title search and the writing of an opinion of title by an examiner. The first page is the examiner's opinion of title. Incidentally, our file number is 12144.

The second page is the chain sheet listing the documents recorded.

Q. What, if anything, does the chain sheet show concerning any starter used by the examiner?

A. Again it shows a reference to "See TI & G policy" in this particular case.

The Court: Which is Title Insurance and Guaranty Company. Where would you have gotten that from?

The Witness: The fact that we do or did have in our file a Title Insurance and Guaranty title policy.

The Court: And you could have gotten that from your client, is that right, or how would you have gotten that?

The Witness: It would have been acquired probably from some broker or client from whom we either purchased reports or who voluntarily gave it to us.

The Court: Anything else about that?

Q. (By Mr. Carey): Mr. Rolls, would you say that this file is a typical file or is it an unusual file?

A. This is a typical file.

(Testimony of Jack M. Rolls.)

Q. Would it show a typical use or an unusual use of these preliminary reports or title insurance policies that we have been discussing? [85]

A. Shows the typical use of them.

Q. If we were to go through the Bay Counties record of transactions, would we find that in a significant number of cases, that we had starters like this and the same use has been made of them?

A. Yes.

Q. Do you recall what number of file you are now up to in your record keeping, Mr. Rolls?

A. This morning I think I took an order and the number was 37745.

Q. Does that represent separate transactions?

A. Yes, we have not skipped any numbers in our company.

Mr. Carey: Thank you. I will ask that that be admitted as Petitioner's Exhibit No. 3 in evidence.

The Court: Any objection?

Mr. Boyle: No.

The Court: There is received in evidence.

(Petitioner's Exhibit No. 3 was received in evidence.)

Mr. Carey: The clerk has the copy and we will withdraw the original.

Q. (By Mr. Carey): Mr. Rolls, I am quoting from counsel's opening statement this morning. I believe this is a verbatim quote.

"They have no means of assembling it or identifying [86] it or screening it and they can't even tell today what they did buy. All that they can say is

(Testimony of Jack M. Rolls.)

that they bought something, so we think they were still basically trying to bring in business by first making payments to the real estate broker."

Mr. Rolls, do you have any means or technique in Bay Counties Title Guaranty Company for assembling or identifying this information that is contained on these reports? A. Yes, we do.

Q. Do you have any means in Bay Counties Title Guaranty Company for screening it?

A. Yes, we do.

Q. Are you aware, Mr. Rolls, of your own knowledge, of what you have in regard to the reports that you have bought from various people?

A. Yes, I do.

Q. Mr. Rolls, I am going to hand you a document—we are not going to admit this in evidence, your Honor,—a packet that has a number 3568-3576. Would you describe what that is, Mr. Rolls?

A. That is a file containing a group of these preliminary reports and policies of title insurance which we have acquired.

Q. Would you describe from that file the means that you have of screening that information, identifying it and making it useable at a later date?

A. Each one of these reports or policies of title [87] insurance, of course, describes a particular piece of property. Each of these reports and policies of title insurance designates an assessor's lot and block in connection with the legal description of the property. It so happens that our arbitrary system for locating the real property is similar

(Testimony of Jack M. Rolls.)

to the assessor's lot and block system. Therefore, each one of these reports is numbered. There are little numbers up in the upper right-hand corner and that's the process which is used in segregating them and putting them in proper order. It was easier to do that than have to read through. In other words, each one was gone through and numbered in pencil and subsequently segregated as to block number and lot number and then clipped together in groups of what would be more easily handled packets.

These numbers are in turn placed in our title plant, our index of properties, and we use a card system for that, and on these cards is marked a red S, which denotes on that particular card affecting that particular piece of property that we have a starter.

That card number is the same as the numbers on these reports and therefore, when we get an order for a preliminary report of title and we go and we find that that card has a red S on it we know that we have a starter report or policy for that particular piece of property, and we can then go to this file or if it happened to be Lot 35 or Lot 5 in Block 3568, [88] we have a starter for that particular lot. This would be taken out of this file and put with the order and the chain sheet and the search is completed in a particular order number.

Therefore, these will gradually go down to a point, or as we gather more of them, of course, it depends on these reports, but gradually these re-

(Testimony of Jack M. Rolls.)

ports would be transferred from this file to our current escrow file or current order file.

Q. Mr. Rolls, assuming that a transaction comes into your office and you are asked to provide a preliminary report or title insurance on a piece of property for which you do not have a starter, what then would you do to replace the information furnished by that starter?

A. That's what we call a full time search and it depends on, as I pointed out a little earlier, how far back in the records you have to go. Of course, the records in San Francisco originally started in 1906. I mean they were not originally started but they were reestablished as of 1906, as of the earthquake and fire, so that is our starting point for real property here in San Francisco.

In the event that we do not have a starter report or policy, then we have to go back to a point at which we consider is a safe point to begin. Now, that can be, as I pointed out earlier, the date of the filing of a map. The reason for that being that as of the date of recording [89] and filing of a map, the title of the property had to be clear. Therefore we know, starting at the date of filing a map, from that point on it can be continued down without any question as to the prior title having any cloud. If there is no filed map then we go back to, in many cases or most cases, back to 1906 or 1908, whenever we get the first records or changes of title in the property. So that can involve quite a bit of time.

Q. Would you have to pay a man for that work?

(Testimony of Jack M. Rolls.)

A. Yes, that involves using our searchers to do that particular work.

Q. Do you maintain, of your own knowledge, something like cost accounting in Bay Counties?

A. That's a very difficult thing to do in title insurance. I don't think there's any title insurance company in California or the United States that can come out with a true cost accounting system for the cost of a preliminary report.

Q. From your experience in the title business, Mr. Rolls, taking a typical transaction or two typical transactions, one in which you had a preliminary report or title insurance policy of two or three years ago, and one in which you did not, would it be more expensive to prepare a preliminary report—which would be the more expensive to prepare the preliminary report in the typical case? [90]

A. In the typical case, the one on which we had to go back and did not have a starter would cost more to prepare a preliminary report on that basis than the one in which we actually had a starter.

The Court: What is the difference between a starter and a preliminary report?

The Witness: They are both the same, your Honor.

Mr. Carey: I believe, your Honor, that they refer to them as a starter because they start their subsequent search at that point.

The Court: Is that right?

The Witness: That's right.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Carey): Mr. Rolls, are you familiar with title practices in the City and County of San Francisco, of the title companies in San Francisco?

A. Yes, I am.

Q. I believe you testified that you were associated with the City Title Insurance Company for about eleven years, is that correct?

A. That's correct.

Q. Do you know of any arrangement for exchange of title information which the title companies in San Francisco have?

A. Yes. The other four companies in San Francisco do [91] have an agreement or an arrangement, which ever way you might call it—there's nothing in writing—it's a tacit understanding that they exchange reports, they exchange letters if indemnity, in connection with searches of property in San Francisco.

Q. Would you describe using a transaction, how this would work?

A. Well, supposing a broker or someone—an order is placed with——

Mr. Boyle: If your Honor please, I am going to object unless the witness tells from what source he derives his knowledge. If he is deriving it from hearsay, then this testimony is not permissible.

The Witness: This is not hearsay. This is from my experience when I was with City Title Insurance Company doing the searching at that particular company.

(Testimony of Jack M. Rolls.)

Mr. Boyle: But City Title is not one of the big four.

The Witness: Yes, it is, excuse me.

Mr. Boyle: I beg your pardon.

The Court: You may proceed. The objection is overruled.

The Witness: Your Honor, let me explain. There are four title insurance companies and one title company in San Francisco. We are the title company and there are four [92] title insurance companies in San Francisco.

The Court: What are the names?

The Witness: California Pacific Title Company, Western Title Insurance and Guaranty Company, formerly the Title Insurance and Guaranty Company, Northern Counties Title Insurance Company, and City Title Insurance Company. We are Bay Counties Title Guaranty Company and not an insurance company.

The Court: Go ahead.

Q. (By Mr. Carey): Would you describe the arrangement between the so-called big four for exchanging title information?

A. If Mr. Boyle would prefer, I will give an experience that I had while searching at the City Title Insurance Company.

The Court: Is this the question?

Mr. Carey: Yes.

The Witness: I was giving a hypothetical one before but——

(Testimony of Jack M. Rolls.)

Q. (By Mr. Carey): Would you give a definite one rather?

A. When I was working at the City Title Insurance in the search department, and I would be searching a piece of property on which California Pacific Title Insurance Company had had a previous recording and had issued a policy of title insurance or had made a search of title, I would in turn [93] at that particular time, in checking the records, and finding that out, would immediately send over to the California Pacific Title Insurance Company and request that they send over their run-down report and policy sheet for the issuance of a policy of title insurance and the basis of that search that we then completed at City Title Insurance Company was based on the California Pacific's report down to that particular date and they had written their policy and City Title Insurance Company then continued that down to the current date on which the particular search that I was working on was being issued.

Q. Would it be accurate to say that you as a searcher would use the California Pacific Title Report or insurance policy as a starter?

A. Yes, and that is also true of the other three companies, or in other words, California Pacific, Western Title Insurance and Guaranty Company, and Northern Counties Title Insurance Company have had the same experience with all of those, when I was down there.

(Testimony of Jack M. Rolls.)

Q. Is Bay Counties a member of that arrangement? A. It is not.

The Court: I can hardly hear your question. Will you repeat it?

Q. (By Mr. Carey): Is Bay Counties Title Guaranty Company a participant in that arrangement? [94] A. It is not.

Q. To what extent is it common practice for title companies in Northern California or generally in California, Mr. Rolls, to purchase preliminary reports to use as a starter?

A. I know this of my own knowledge, Mr. Boyle. The title companies or title insurance companies, depending on whichever happens to be starting out as a new company, have made a practice for—before I was in the business, of acquiring preliminary reports of title or starters, either from brokers, lending institutions or wherever they could be obtained. They are either obtained free or were paid for.

Q. Do you know of your own knowledge how these were treated, bookkeeping-wise, by the title companies?

A. I inquired of City Title Insurance Company in San Jose—

Mr. Boyle: I object to this as—you don't know this of your knowledge. This is based on hearsay.

Mr. Carey: I think that objection is premature. The question was: Do you know of your own knowledge how they were treated, and the answer there is yes or not and then if—

(Testimony of Jack M. Rolls.)

The Court: All right. You go along from that point.

Q. (By Mr. Carey): Do you know of your own knowledge how these were—— [95]

A. According to the other companies' books, no, I do not.

Q. So any knowledge would be simply hearsay knowledge that you had of how they told you they were treating them? A. Correct.

Q. In a typical case, Mr. Rolls, would the cost of procuring these preliminary reports represent a greater or lesser expenditure of money than would be necessary if the title in question were presently abstracted by one of your employees?

A. The purchase of preliminary reports in order to reduce the cost of searching, of course, would vary on the particular piece of property.

However, in the overall picture of operating a title company or title insurance company, being able to use preliminary reports or policies of title insurance as starters does cut down the cost tremendously.

Q. Mr. Rolls, do you know how your bookkeeping system treats, bookkeeping-wise, the expense of abstracting titles? Is it capitalized or currently expensed?

A. It is currently expensed as far as we are concerned now, because it is maintaining our plant.

Q. Do you know how your books or your tax returns reflect the cost of abstracting titles?

A. Currently? [96]

Q. Yes.

(Testimony of Jack M. Rolls.)

A. Currently as an operating expense.

Q. During the years involved, that is, during 1952, 1953, and 1954, was it your practice to buy preliminary reports or title insurance policies from any broker who had one that you wanted?

A. Yes.

Q. Did you buy them from any other people during these years? A. Yes.

Q. From whom?

A. We purchased them from a bank manager or—yes, it was a bank manager.

Mr. Boyle: What year is this?

Mr. Carey: The years involved, 1952, 1953, and 1954.

The Witness: We purchased them from—I think one was a savings and loan, for a period of time, and then they stopped the procedure.

Q. (By Mr. Carey): Are the real estate brokers in the City and County of San Francisco—which one or ones supplied you with the largest volume of business?

A. Our best client, the one who provides us with the largest, is the office of Green and Kaufmann.

Q. Have you ever bought any reports from them? A. No.

Q. Have you ever paid them any money?

A. No. Excuse me, now, may I qualify that?

Prior to this period of time we used to pay a commission. Prior to the time the law was changed, yes.

(Testimony of Jack M. Rolls.)

Q. But since the law was changed—when was the law changed, Mr. Rolls? A. In 1951.

Q. Since 1951 you have not paid Green and Kaufmann any funds of money? A. No.

The Court: How does that check with the testimony of the witness from that concern here who testified this morning?

Mr. Carey: I think the testimony would show, your Honor, that as an individual he received money, but as sales manager of Green and Kaufmann no money was ever paid to Green and Kaufmann.

The Court: That was Mr. Farnow?

Mr. Carey: That is correct.

The Court: Is there something inconsistent in this witness' testimony?

Mr. Carey: No.

The Court: Why isn't it inconsistent? [98]

Mr. Carey: Because Mr. Farnow was sales manager, according to the testimony, of Green and Kaufmann until 1952 or early 1953. He testified that while he was sales manager of Green and Kaufmann that he never—they never received any money from this Petitioner here, but after he went into his own concern, or in partnership with a Mr. Brown, that he consistently sold preliminary reports to Bay Counties and was paid for them. I think that was his testimony.

The Court: You don't deny that?

Mr. Carey: No, we don't deny that at all.

The Court: All right.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Carey): Is there any reason why you have not purchased any reports from that particular broker, that is, Green and Kaufmann?

A. They did not want to sell them to us, for one thing, and they wanted to maintain their own files on them, is what it amounted to.

Q. But after refusing to sell you those reports, did their volume of business with you decline?

A. No. It increased as a matter of fact.

Q. Are there any other instances where brokers have placed business with you wherein you have not purchased reports from such brokers?

A. Yes.

Q. Are there many or few? [99]

A. There are many.

Q. To your knowledge, has the volume of business increased or decreased depending upon the fact that you did not purchase reports from them?

A. It seemed to make no difference.

Q. Are there instances, Mr. Rolls, where you purchased reports who have not furnished you with any business?

A. Yes.

Q. Can you call any of those to mind at the present time?

A. I can recall two very distinct ones because we have received so many reports.

Mr. Boyle: What year are you talking about?

Mr. Carey: We can make it any period of time from 1947 until 1954.

(Testimony of Jack M. Rolls.)

Mr. Boyle: I object to that. That will not go to the question involved here. It is immaterial and irrelevant.

Q. (By Mr. Carey): I will confine it, Mr. Rolls, to the years 1952, 1953 and 1954.

A. Yes, we did.

Q. What brokers were those, if you recall?

A. Sala & Sala, and John J. Lagorio.

Q. They furnished you no business?

A. They furnished us no business, correct.

Q. Did you buy a considerable number of reports from them? [100] A. Yes.

Q. Do you know of any other title companies in the Bay area that have the practice of buying preliminary reports? A. Yes.

Q. What other title company?

A. One that doesn't do it now, one that did do it, was Peninsula Title Guaranty Company in San Mateo County which is now City Title Insurance Company, City Title Insurance Company in San Jose in Santa Clara County. I don't think they are continuing to do it. They did do it.

Q. Did they do it since 1951? A. Oh, yes.

Q. What else?

A. The Land Title Insurance Company in Alameda has purchased reports, I think, ever since their inception.

Q. Do they continue to do so?

A. They continue to do so, although—no, I think that has been terminated by a person from whom they purchased the reports.

(Testimony of Jack M. Rolls.)

Mr. Boyle: May I have that last question and answer read?

(Question and answer read.)

Mr. Boyle: I ask that the last three answers to the last three questions be stricken on the ground that this witness is not competent to testify as to what other title [101] companies do.

The Court: You may ask him, if you want to, before you make your motion to strike.

Mr. Boyle: I move that the last three answers be stricken.

The Court: The motion to strike is denied. I have no reason to assume that he is giving hearsay testimony. You are just assuming that he is giving hearsay testimony. You have to ask a few questions to find out whether he was or not.

Mr. Boyle: I request to take the witness on voir dire.

The Court: Go ahead.

Voir Dire Examination

Q. (By Mr. Boyle): Mr. Rolls, did you work for the title companies to which you just referred?

A. No, I did not.

Q. Your knowledge then——

A. Except City Title.

Q. So therefore your knowledge of what they might be doing or have been doing would be based upon what someone told you, isn't that correct?

A. From what the owners of the company told me.

(Testimony of Jack M. Rolls.)

Q. Yes, what they told you. [102]

The Court: Is that necessarily hearsay?

Mr. Boyle: Yes, I believe it is, your Honor.

The Court: I don't know how else you would find out.

Mr. Boyle: You could bring in the owners of the other companies, if he wanted to prove that this was being done by other concerns. I don't think it would make any difference, but I do believe that it would certainly be hearsay if he is testifying to what they did because someone told him.

Mr. Carey: I think, your Honor, it is not hearsay. It particularly is as true of Mr. Boyle's interpretation of Section 12404 of the Insurance Code. These would be declarations against interest by these people. If Mr. Boyle is correct this would be confessions of a crime. They violated the Insurance Code, for which their charter could be forfeited.

Mr. Boyle: This man is attempting to testify as to the business practices of other concerns. I don't think he has shown he is qualified to do that.

The Court: I will let the answers stand.

Mr. Carey: Thank you, your Honor.

Direct Examination—(Continuing)

Q. (By Mr. Carey): Mr. Rolls, are you acquainted with any of the other agencies of the Pacific Coast Title Insurance Company in this area?

A. Yes.

(Testimony of Jack M. Rolls.)

Q. Do any of those others, those that you have mentioned in your previous answers, have they adopted this particular practice of buying preliminary reports? A. Yes.

Q. To your knowledge? A. Yes.

The Court: How do you know that?

The Witness: For one thing, by reading an ad that they have produced when they first opened.

The Court: What would they have said in their ad?

The Witness: They would reduce the cost of title policies, the cost would be reduced a certain amount—I have forgotten the exact figures—if they were furnished with either a policy—or I think they required a policy of title insurance of another title company. I also am a very close personal friend of the President of the company.

The Court: Go ahead.

Q. (By Mr. Carey): Are there any other title companies in the State of California, Los Angeles area or in any other areas of California, who adopt this same practice, to your knowledge?

A. Again it is hearsay as far as that is concerned, from the individuals, but the——

The Court: I think it is too bad you did not bring [104] in at least one witness from one of these other companies.

Mr. Carey: We did, your Honor. Mr. Smith this morning. He testified that this was the practice.

The Court: That was Elias W. Smith from the Pacific Coast Title Insurance Company?

(Testimony of Jack M. Rolls.)

Mr. Carey: Yes, your Honor.

The Court: His testimony is, according to my notes, that it was customary for them to purchase this information. From 1952 to 1954 title starters were purchased from others and preliminary reports, and I think his testimony is that they stopped doing that in 1954.

Mr. Carey: I don't know that. Mr. Boyle has limited me to testimony in 1952 to 1954. I have not attempted to go outside those three years because those are the years involved. The practices in any other years would be tending to get a little further away in point of relevancy.

The Court: All right. Go ahead. Just avoid hearsay testimony because I won't be able to give much weight to it.

Q. (By Mr. Carey): During the years in question, that is, 1952 to 1954, did you ever have occasion to discuss this particular practice of buying preliminary reports with your counsel?

A. Yes.

Q. Who was counsel for the Bay Counties Title Guaranty?

A. Mr. Joseph S. Rogers. [105]

Q. Did this discussion concern whether this practice violated any law of the State of California?

A. Yes, it did.

Q. Did he advise you that it did or did not violate any law?

A. He advised us that it did not.

The Court: What is the attorney's name?

Mr. Carey: Joseph S. Rogers.

(Testimony of Jack M. Rolls.)

The Court: He is here in the court room?

Mr. Carey: He is here in the court room.

Q. (By Mr. Carey): Did he give anything other than his own opinion concerning the legality of these transactions, Mr. Rolls?

A. Subsequently we acquired a written opinion from the Legislative Council of the State of California with respect to the legality of this particular practice in connection with purchase of preliminary reports.

Mr. Carey: I would like to have this marked, if the Court please, as Petitioner's next in order.

The Clerk: Four for identification.

(Petitioner's Exhibit No. 4 was marked for identification.)

Q. (By Mr. Carey): Mr. Rolls, I hand you Petitioner's Exhibit 4 for identification and ask you: Is that the opinion that you [106] have reference to? A. Yes.

The Court: Who gave that opinion?

The Witness: Ralph N. Kleps, Legislative Counsel, by Bernard Czesla, and it is dated October 27, 1953.

The Court: And it is addressed to——

The Witness: Honorable John F. Thompson, Route 3, Box 408, San Jose.

The Court: Who is he or was he?

The Witness: State Senator.

Q. (By Mr. Carey): You came in possession of this particular opinion, Mr. Rolls, through the medium of your counsel, is that correct?

(Testimony of Jack M. Rolls.)

A. Yes.

The Court: Respondent has already seen that, it was attached to the application to take a deposition.

Q. (By Mr. Carey): And are you familiar with the contents of that ruling? A. Yes.

Q. Did Bay Counties Guaranty Company attempt to bring its conduct in the years in question within the terms of that ruling? A. Yes.

The Court: How or why or both? Your answer won't mean very much to me in reading the record unless you explain [107] it.

The Witness: Well, I think—may I read this opinion and then explain how we complied with it?

The Court: Yes, you have read it before, of course, have you not?

The Witness: Yes.

The Court: You want to refresh your recollection?

The Witness: That's right.

The Court: All right. Look it over.

The Witness: Well, it's on page three, your Honor, the section at the top of the page: "There is therefore no statutory reason why an insurer may not purchase a copy of the old title insurance policy for the specific property and issue a new policy of title insurance relying in whole or in part upon the facts contained in the former policy, as long as the cost of purchasing such policy is included in the charges for the new policy as required by Section 12401 to 12412.

(Testimony of Jack M. Rolls.)

“While this practice of purchasing copies of title insurance policies generally would not be violative of any statutory provision, the question arises as to whether such a purchase, if made from a real estate broker who was the agent of one of the principals in the transaction with which the title insurance is sought, would be violative of the statutory provisions prohibiting the payment of commissions and rebates.” [108]

It goes on to the end of the letter and it says: “The payments here in question do not meet this definition.” This refers to the rebate mentioned previously, and “Payments are not made to the policy holder and cannot be said to constitute an abatement or remission of any part of the fee to such policy holder. The payment is made to the broker because the broker has a document of value to the insurer which he delivers to the insurer, not because the broker is an agent of one of the principals in the transaction in connection with which the title insurance is sought. Presumably the payments are made to any party who can supply documents upon which the insurer may rely in issuing a policy of title insurance.”

In our practice in purchasing these reports, we did not require that it be in connection with any particular record title that we were asked to issue at that particular time, but we bought for all property in San Francisco regardless. As a matter of fact, the more that we could get the better we liked it. We were certain that as far as any particular

(Testimony of Jack M. Rolls.)

transaction was involved, that there was no payment for any that could be considered as a rebate or a commission or any thing that would be contrary to the law.

The Court: Well, now, the thing this Court is going to have to decide in this case is whether the expenditure for one of these copies of a preliminary report must be [109] capitalized or whether it can be expensed and in considering that question we will be obliged to apply general principles.

Now, you have just stated that you did have a practice of acquiring these preliminary reports whenever you could find them. Then you would keep them in your files and you expected that perhaps at some future time it would be useful to you?

The Witness: That's correct.

The Court: Now supposing you paid \$50 for a preliminary report in 1946 but had no use for it at that time and it wasn't until 1956 that you really had use for that preliminary report. There the expenditure was made in 1946, we will say, but you didn't use the item until 10 years later.

Now, the question would be: Why isn't that the kind of expense that you should capitalize? You are not using up the item that you made the expenditure for in the taxable year. That is the principle on which you expense items, is that you are using up the item. It isn't an item that has any useful life to you over a period of years. If you make an expenditure for something that is going

(Testimony of Jack M. Rolls.)

to have a useful life over a period of years, then you must capitalize it.

So in your business it might be that some of these expenditures would be properly expensed. If you are going to handle an escrow in 1952 for a piece of property located [110] on the corner of Geary and Stockton Street and you obtain at that time a copy of a preliminary report. You use it for that transaction, which you work on in 19—I have forgotten the date.

Mr. Boyle: 1952, 1953 and 1954.

The Court: I may have taken 1953 as the year.

You pay \$50 in 1953 for a preliminary report on the piece of property at the corner of Geary and Stockton Street, but you use it right away in that transaction and you are paid for your services in 1953 and the transaction, as far as you are concerned is closed in 1953 and you pay out some expenses in connection with that transaction. Now, all those expenses you would offset against that income if the thing has been used in the taxable year. You made use of this preliminary report in the taxable year in connection with the particular transaction. All right. You expense that.

But if you were going to purchase these preliminary reports for searches of title, parcels or pieces of property here, there and everywhere throughout San Francisco, wherever you can get them, and put them in your files or library until such future time as you make use of them, then it would seem that you have there an expense that should be capitalized.

(Testimony of Jack M. Rolls.)

What are you going to do about that?

Mr. Carey: If the Court please, it has been recognized by the Internal Revenue Service since 1921 as set [111] forth in OD No. 1,018, which is filed at 5 Cumulative Bulletin, Page 119, and I am quoting this OD.

The Court: What is that, Roman numeral 5?

Mr. Carey: No, it is 5 CB Page 119.

The Court: Part 1 or Part 2?

Mr. Carey: I think at that time it was all one volume, and I am quoting from that:

"Title abstract companies incur relatively large and continuous expenditures in keeping their plants up to date, such as the expense of adding and incorporating in the plant records that are being made daily in the various Courts and in the Recorder's Office. These records which are added to and incorporated in the plant for the purpose of keeping it in an up-to-date running order and preventing depreciation, are in the nature of ordinary and necessary repairs. The expenses therefore incurred in making such records are current expenses and as such are deductible for the year in which paid or incurred."

The Court: You are relying on that Office Decision?

Mr. Carey: That is correct. That is the practice, this is the reality of the business.

The Court: Why did the Commissioner make this determination in this case?

(Testimony of Jack M. Rolls.)

Mr. Carey: If your Honor will look at the 90-day letter, the capital expenditure idea is an afterthought. It [112] is not the principal ground on which they rely. They started out believing that we had violated the Insurance Code of the State of California and this is in the 90-day letter.

The Court: What is your next question?

Q. (By Mr. Carey): To your knowledge, Mr. Rolls, have any charges ever been placed against any title company by the Insurance Commissioner because of the practice of purchasing preliminary reports? A. No.

Q. Have any charges ever been placed against Bay Counties? A. No.

Q. Did you purchase any preliminary reports in the years in question from a McPhee Realty Company? A. Yes.

Q. What company is that? Who owned the McPhee Realty Company at that time?

A. Chester McPhee.

Q. Who is Chester McPhee?

A. He is the past Collector of Customs and is presently the Chief Administrative Officer of the City and County of San Francisco.

Q. Mr. Rolls, in 1952, how much, if anything, did you pay real estate brokers for the purchase of these preliminary [113] reports? A. 1952?

Q. Yes. A. \$6,896.

Q. How did you treat that in your tax return?

A. In 1952 that amount, as I recall, was charged off as advertising expense.

(Testimony of Jack M. Rolls.)

Q. In 1953, how much, if anything, did you pay to real estate brokers for the purchase of these reports? A. \$8,581.

Q. How did you treat that in your income tax return? A. As advertising expense.

Q. In 1954 how much, if anything, did you pay real estate brokers to purchase these preliminary reports? A. \$7,534.

Q. How did you treat that in your tax return?

A. Again as an advertising expense.

Q. Mr. Rolls, was there any reason for treating this as advertising expenses in your tax return?

A. Yes.

Q. What was that reason?

A. We had applied in 1951, I think it was, for a refund against a loss. In other words,—

Q. A carry back refund?

A. Yes, and at that particular time, on that application [114] for a refund for carryback loss, our books were audited or checked by the Internal Revenue at that particular time.

I think it was a Mr. Kewman—K-e-w-m-a-n—I think it was, was the gentleman who checked our books at that particular time. Prior—I forget what date it was—in 1952, we had been charging that item as a plant expense, operating expense. In the dicussion with Mr. Kewman he asked about it and he said, “Well, I think that rather than charging it to plant expense, you should charge it to advertising.” That’s why we changed from charging it to plant expense to advertising expense.

(Testimony of Jack M. Rolls.)

Mr. Carey: Thank you, Mr. Rolls. I have no further questions.

Cross Examination

Q. (By Mr. Boyle): Mr. Rolls, as I understand it, you started business with Bay Counties in January of 1947. Is that correct?

A. No, I started with the incorporation of it in July of 1946.

Q. When did you start business?

A. Actually open the doors?

Q. Yes. A. In September, 1946.

Q. From September, 1946, until about September of 1951, did you have a practice of paying ten percent of the escrow [115] fee and title insurance fee to real estate brokers who brought business to Bay Counties?

Mr. Carey: I object. I don't know what relevance it has. It has been brought out here that the statute permitted this up until 1951. What relevance will it have from that period on? The fact that he complied with the law when it was lawful to pay commissions does not have any effect upon what he did after it was unlawful to pay commissions.

The Court: What is the relevance?

Mr. Boyle: What they were doing after 1951 was the same as before. The record will show continuation of the old practice. We think the picture presented to the Court will then be clear and distinct as to what the whole transaction was.

(Testimony of Jack M. Rolls.)

The Court: The objection is overruled.

Answer the question and then I am going to take a recess for a few minutes.

The Witness: Where were we again?

(Question read.)

A. I don't recall that it was 10 percent but we did pay a commission to brokers for bringing business to our office, yes.

The Court: Step down, please. We will resume in a few minutes. [116]

(Short recess.)

Q. (By Mr. Boyle): Mr. Rolls, would you pay this commission to these real estate——

Mr. Carey: I object to the use of the word "commission." If he wants to use "sum of money" that is fine. We have contended and we are not going to permit questions which use the word "commission". That is an attempt to trip this witness and attempt to show that this witness is violating the law by paying a commission.

Mr. Boyle: That is agreeable. I will change the word.

Q. (By Mr. Boyle): Mr. Rolls, in making these payments to the real estate brokers prior to 1951, did you do so without regard to whether or not you received a preliminary title report or title policy?

A. Yes, although we requested that—we asked the brokers from the time we started writing title insurance that we be furnished wherever possible preliminary reports or policies of title insurance.

(Testimony of Jack M. Rolls.)

Q. You asked them for one but if they did not have one, you made the payment to the broker anyway? A. That is prior to 1951?

Q. Yes, prior to 1951. Is that correct? [117]

A. Yes.

Q. Did you acquire the idea of buying these reports from a title company in San Mateo?

A. Yes.

Q. And that was the result of the law being passed in 1951? A. No.

Q. When did you change your system, as you state, from making payments to the brokers without regard to title reports?

Let me ask you this, Mr. Rolls, is your system any different today or during the years involved herein, 1952, 1953 and 1954, from the system you followed prior to 1951 as concerns payments to real estate brokers? A. Yes.

Q. It is different? A. Yes.

Q. In what way is it different?

A. We were purchasing more reports in 1952, 1953 and 1954, as a matter of fact. We made a concerted effort to obtain reports from brokers.

Q. Were these preliminary title reports or title policies any more valuable to you in 1952, 1953 and 1954 than they were before 1951?

A. Relative values are always the same regardless. [118]

Q. I believe your records show that Bay Counties had a bank account in 1952, 1953 and 1954?

(Testimony of Jack M. Rolls.)

That is, you had a checking account from which you drew checks, is that correct? A. Yes.

Q. And you made payments of certain expenses by check, is that right? A. Yes.

Q. Why did you not make these payments to the real estate brokers also by check?

A. It was simpler to make it by cash, as far as the bookkeeping entries were concerned.

Q. So far as the bookkeeping entries were concerned, that took two entries, did it not, a check to Buy Counties Title which you cashed and then took the cash and made the payment to the brokers. Is that right?

Mr. Carey: I object. That is argumentative, your Honor.

The Court: Objection overruled.

The Witness: May I have that question again, just to get it read?

The Court: Read the question.

(Question read.)

The Witness: There were not two bookkeeping entries, only one. [119]

Q. (By Mr. Boyle): Also you had to make an entry showing this was an advertising expense, did you not?

A. That was done in one item, as far as the cashing of that check was concerned, one entry.

Q. How did you make the payment in currency to these brokers? Did you do that personally or by mail? A. Personally.

Q. Did you go to their place of business?

(Testimony of Jack M. Rolls.)

A. Sometimes.

Q. How much did you generally pay for a preliminary title report or a title insurance policy?

A. It varied.

Q. On what would you base your estimate of that value?

A. Might I explain it this way?

The Court: Do you mean on what did they base the amount that was paid?

Mr. Boyle: Yes.

The Witness: Your Honor, might I explain it this way?

In a majority of the offices to whom we paid money for reports, the discussion as to the payment for reports and the obtaining of those reports was handled usually with the owner of the office, the purpose being, of course, that those [120] are their personal files where those reports or policies are filed. That request would be made of them, if possible that either myself or someone from our employ, a trusted employee, could go through their files and pull the reports from their files and in turn take them to our office for our use. There were innumerable offices where the number of reports that were pulled were in the thousands, so that the basis of payment that was arrived at for those, in most cases, was the fact that when they gave us business we in turn would pay them a certain amount. If they did not give us business and they wanted cash for those reports, we would arrange to pay them cash over a period of time.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Boyle): Did you make payments to any brokers in 1952, 1953 and 1954 where they did not bring you business? A. Yes.

Q. Did you record those payments and claim them as advertising expense? A. Yes.

Q. Will your books and records show that?

A. I don't know. They will show a cash payment and that's about it.

Q. Are you saying that your books will show this or won't show this?

A. They will show an amount of cash drawn, yes. [121]

Q. Will it show a payment to a broker?

A. No.

Q. Charged as advertising expense?

A. No. It will merely show the report costs and charged to advertising.

Q. It will show a charge to advertising expense?

A. Yes.

Q. What record will show that?

A. The entries in our daily ledger which you looked at before.

Q. Mr. Rolls, I am not trying to confuse you, but I believe that entries in the daily ledger will show payments to real estate brokers in a certain amount and if you total all those amounts it will come to the amount of advertising that you claimed in each year and on which you took a deduction.

Now, I am asking you: Are there any other payments made to brokers which are not included in

(Testimony of Jack M. Rolls.)

those amounts of advertising that we have discussed before and you mentioned the amounts?

A. No, they are all included in the figures there.

Q. Then, in other words, whatever payments you made to real estate brokers in 1952, 1953 and 1954 will be reflected in the broker account, is that right?

A. Some of those will not show the broker to whom we [122] made the payment, where we did not get business from them, or, in other words, those are not—excuse me, you are getting a daily ledger sheet confused with those. Those are our daily ledger sheets. These others are merely a personal record of the volume of business received from all real estate offices.

Q. Now, you have said the amounts that you paid to these individual brokers did bear a relationship to the amount of the escrow fee involved in the transaction which they later brought in. Is that correct?

A. The only basis on that was the fact that we received a certain amount of business from them and in turn had agreed to purchase reports or had received reports from them for which we were going to pay them and depending on the number of reports which we received, they received payment spread over a period of time.

Q. Was there a relationship between the amount you paid the broker and the amount of the escrow fee?

Mr. Carey: I object to that on the grounds that if he is asking what the records will show, that the

(Testimony of Jack M. Rolls.)

records would be the best evidence of that fact and this witness should not be requested to recall every entry in his books to show what these records would show in the amount of relationship.

Mr. Boyle: I am asking for this witness's [123] understanding of the matter.

Q. (By Mr. Boyle): Do you understand that there was a relationship?

A. There might have been, yes, but it was not too definite.

Q. Would this relationship exist irrespective of the number of preliminary reports or title policies that might exchange hands?

A. No, not necessarily.

Q. In other words, were you paying these brokers on the basis of valuing each specific report or policy?

A. I would say on the number that they gave us.

Q. Then my next question is the same as before. There was no connection between the amount paid and the number of reports that you received, is that correct?

A. Yes.

Q. What was that connection?

A. Well, as I say, in one office we picked up about 5,000 reports, a little over 5,000 reports.

Q. What did you pay for those 5,000 reports?

Mr. Carey: If you recall.

The Witness: I don't recall.

Q. (By Mr. Boyle): Take another office in which you supposedly bought five reports. On what

(Testimony of Jack M. Rolls.)

would you base your estimate of value [124] on the five? A. I don't know.

Q. In other words, you do not recall and you were the buyer of these reports, you do not recall ever putting a value on a single report as such. Is that correct?

A. Oh, yes. I have put a value on a single report or a policy.

Q. I am asking you for that. What value did you put on any one?

A. I don't recall the exact value right now on a particular transaction.

Q. You do not recall the exact value of any report, is that right?

A. The exact value—I know that there are or there has been exact values put on some reports, yes.

Q. What was your mental computation that you went through in arriving at a value, if you do not recall the specific figure, what was your method of putting a value on a report or a number of reports?

A. The location of the property within the City and County of San Francisco. There were certain areas in San Francisco which the background of titles is quite complicated and reports or title starter reports or policies within those certain areas are more or less invaluable, as far as that value to us is concerned because they contain information which [125] is difficult to obtain.

Q. Then you are telling the Court that these records will not show any definite percentage, if

(Testimony of Jack M. Rolls.)

the amount paid to the broker is related to the escrow fee? A. I didn't say that.

Q. Do you think there will be a percentage relationship?

Mr. Carey: I object. He is asking what he thinks and the records will show that and the best evidence rule says that it should be obtained from the records themselves, not from this witness.

Mr. Boyle: Now, the witness is testifying, your Honor, that he placed a value on each specific report and I am asking him——

Mr. Carey: The witness did not so testify and the question was asked several times. The witness was asked what the mechanics of valuing particular reports were and he explained what he went through to arrive at a value.

Q. (By Mr. Boyle): Do you think there is a connection between the amount paid the individual broker and the amount of the escrow fee of the business brought in by that broker?

Mr. Carey: I object to that on the ground that the best evidence rule, your Honor,—the records are available. If counsel wants to put them in evidence to show a relationship, he has every privilege of doing so but that is a matter [126] of proving the records.

The Court: The objection is overruled. The witness is the head of a business. He owns the business and he ought to know what his general procedure is and I would think that his knowledge would be the best evidence.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Boyle): Did you keep a business record of these broker accounts?

A. Now, do you mean by a "business record" a ledger, a regular bookkeeping entry?

Q. Yes. A. No.

Q. Do you have an account here in Court which will show the escrow transactions with specific brokers and the amounts paid to those brokers?

A. It will show all brokers that we dealt with during a period of a month.

Mr. Boyle: May I have that set of records?

I will ask that this be marked for identification as the Respondent's next in order.

The Clerk: E for identification.

(Respondent's Exhibit E was marked for identification.)

The Court: What was 4 for identification? It hasn't been received in evidence. [127]

Mr. Carey: Not yet.

The Court: Are you going to offer it later?

Mr. Carey: I will offer it later, that is right.

The Court: What is it?

Mr. Carey: It is the opinion of the Legislative Counsel concerning the interpretation of Section 12404 of the Insurance Code.

The Court: Go ahead.

Mr. Carey: We will stipulate that those can be admitted into evidence as having been prepared by Mr. Rolls and kept by Mr. Rolls.

The Court: I find that arrangement very troublesome later. Then the Court is given the job of

(Testimony of Jack M. Rolls.)

trying to read the record and even if you are willing to stipulate that that can be admitted in evidence the Court will have to have testimony about it. I think you ought to proceed in the usual way. Don't be thrown off your course by that offer to stipulate. Go ahead.

Mr. Boyle: I merely wanted to put them in evidence and then question the witness.

The Court: Get it identified for the record so I know what it is. I don't know what it is and the record won't show what it is.

Q. (By Mr. Boyle): I show you Respondent's Exhibit E for identification [128] and this consists of some 20 pages running from the month of January, 1952, through December of 1954. I ask you if that is the broker account to which you just referred?

A. That is correct. This is my personal record, broker account record.

Q. Directing your attention specifically to the first page which contains entries for the month of January and February, 1952—

The Court: It isn't in evidence yet. Before you offer it in evidence you have got to find out what it is. He said that those are his personal records. They are yellow sheets of paper and they don't seem to have come out of any accounting book.

The Witness: They did not, your Honor.

The Court: Who maintained those records?

The Witness: I did, your Honor.

The Court: You kept them in your office?

(Testimony of Jack M. Rolls.)

The Witness: Yes, your Honor.

The Court: But they are records in connection—maintained in connection with this business, is that correct?

The Witness: With the volume of business received from brokers.

The Court: And is there any other account in the company's books relating to the business with brokers?

The Witness: I have what is called a little black [129] book which also has records as to brokers.

Q. (By Mr. Boyle): But there are no payments in that book, are there, no figures?

A. There are no figures. Well, there are figures as to numbers of transactions, yes.

Q. But Exhibit E for identification is the record which will directly relate to the issue before this Court, namely, the so-called advertising expenses that were deducted and which were made up of payments to real estate brokers in the years involved. Is that correct? A. Yes.

The Court: All right. Offer it.

Mr. Boyle: I offer in evidence Respondent's Exhibit E for identification.

Mr. Carey: No objection.

The Court: Without objection, Exhibit E is received in evidence.

(Respondent's Exhibit E was received in evidence.)

Mr. Boyle: I ask permission to withdraw this and submit photostats, if they can be made.

(Testimony of Jack M. Rolls.)

The Court: Yes.

Mr. Boyle: It is also understood that the parties will attempt to put in some schedule *form* this information. [130]

Mr. Carey: That is agreed.

The Court: That is going to be required by the Court.

Mr. Carey: The parties have discussed this and we will attempt to do it satisfactorily to all parties and do it before the Court leaves this session.

Q. (By Mr. Boyle): Mr. Rolls, I show you Respondent's Exhibit E and direct your attention to the page which contains entries for January and February, 1952, and I will ask you to state what information is contained on any particular line of that page. For instance, the first line is—skip that and let's take line 4. "Earl Realty." Do you see that? A. Yes.

Q. Now, was Earl Realty a broker, a real estate broker?

A. Real estate brokerage firm, yes.

Q. Now, I notice some figures in black ink. What do those represent, the first set of figures after the name "Earl Realty" in black ink? What are those?

A. Those are amounts involved in transactions that were closed by that particular office.

Q. Then the next figure is red, figure \$452.75. What does that represent?

A. That represents—without adding it again—it should represent the total, I think. [131]

(Testimony of Jack M. Rolls.)

Q. It should represent the total of the black figures? A. I think so.

Q. Then underneath that is the figure \$113 in red and also circled with a red pencil. What is that figure?

A. That was the amount that was paid to the real estate office for the reports.

Q. To Earl Realty? A. Yes.

Q. And at that time?

A. Well, it might not have been paid in January. It might have been paid in March or April or something.

Q. Now, a similar set of figures in black ink and red ink follows most or at least a great number of the names on this sheet. If I asked you the same questions, would your testimony be the same with regard to those figures?

A. I think it would be, yes.

The Court: This relates to the taxable year?

Mr. Boyle: 1952.

The Court: One of the taxable years and the Petitioner admits making certain payments, isn't that correct?

The Witness: Yes, your Honor.

The Court: The total amounts that are involved in this case are admitted to have been made by the Petitioner?

Mr. Carey: That is correct.

The Court: The question is to determine [132] what the nature of those payments is, for one thing,

(Testimony of Jack M. Rolls.)

and two: whether they can be capitalized or expensed. That is the way our issue has shaped up.

Mr. Carey: Yes, your Honor.

The Court: Now, you have this record. Let me ask you this question: Am I to understand that we obtain from Exhibit E the individual payments which aggregate the total amount involved in each one of the taxable years in this case?

Mr. Boyle: Yes, your Honor. That is my understanding.

The Court: Have you ever added them up?

Mr. Boyle: The revenue agent has and he says that they will total out. He is here in court.

The Court: Well, now, did the revenue agent in making his audit and writing up his report take figures that were charged to advertising expense from other ledger sheets than this particular record which is now Exhibit E?

Mr. Boyle: No, your Honor. That report contains no reference to any other, if any, so-called advertising expenses.

The Court: Well, I understand that Exhibit E shows amounts that were paid to brokers. Is that right, Mr. Rolls?

The Witness: Yes, your Honor. It shows certain amounts were paid to brokers. In other words, this is a record of what business was received from brokers. Some were [133] paid for preliminary reports and others were not.

The Court: Well, then, it shows in the instances where payments were made, it shows them?

(Testimony of Jack M. Rolls.)

The Witness: Yes.

The Court: It shows that they were made and you have said that all of those payments were charged to advertising expense?

The Witness: Yes, your Honor.

The Court: Well, the record which you have in front of you, Exhibit E, is not a record maintained in an accounting book?

The Witness: No, your Honor.

The Court: Whereas an account for advertising expenses is an account which you maintained in an accounting book. Well, now, are these figures of payments to brokers which are shown on Exhibit E entered somewhere in the regular books as accounting expense?

The Witness: Merely the total, your Honor.

The Court: Total for what?

The Witness: The total amount paid.

The Court: For the month, year or what?

The Witness: For the month, each month.

The Court: For each month. Well, do you have here then the advertising expenditures account?

Mr. Carey: Yes, your Honor. These are the daily ledger sheets. [134]

The Court: Now, those are daily ledger sheets.

Mr. Carey: It is a single entry bookkeeping system.

The Court: Would Mr. Rolls's statement be correct that we would find one figure there as a monthly figure?

(Testimony of Jack M. Rolls.)

Mr. Carey: Yes, your Honor. There would be one figure for the month and a typical month which would be drawn to cash or to Bay Counties Title Guaranty Company, which would be labeled.

The Witness: I think on that particular one, it goes over to the next, in February.

The Court: Then I think we ought to have the ledger sheets marked for identification as Exhibit F so that we can get a few examples where we traced this matter from the work sheet record to the accounting record.

Mr. Boyle: Possibly I can obviate this if I ask the witness this question.

Q. (By Mr. Boyle): These daily ledger sheets, just referred to, will only show a check drawn to Bay Counties Title Company, will they not?

A. That's correct.

Q. They will not and that entry was prepared after Respondent's Exhibit E?

A. Was totaled.

Q. Was totaled, yes, and therefore the daily [135] ledger sheets will not really add anything other than show the amounts paid to brokers were paid in cash.

The Court: They will show the way it was done.

Mr. Carey: I think, your Honor, that they will, and if Respondent does not offer them—I am out of order—but I would be happy to offer them as Petitioner's next in order with permission to withdraw them and prepare summaries.

(Testimony of Jack M. Rolls.)

The Court: I will accept them as Petitioner's offer. That would be Exhibit 5 and it is received in evidence.

(Petitioner's Exhibit No. 5 was marked for identification and received in evidence.)

Mr. Carey: There are three groups of ledger sheets.

The Court: For the taxable years?

Mr. Carey: For the three taxable years.

The first one is denominated "Photographic and Plant Expense." The second one is "Advertising and Entertainment," and the third one "Advertising and Entertainment," on the top sheets and we will prepare summaries which Respondent may have every opportunity to check against the original records and ask that this summary from these be Petitioner's next in order.

The Court: It will be made part of Exhibit 5, I think.

Mr. Carey: Thank you, your Honor. [136]

Q. (By Mr. Boyle): Mr. Rolls, Respondent's Exhibit E consists of 20 pages running from January, 1952, through December, 1954. If questions put to you with regard to what appears on each page were the same as were put to you with regard to the first page for the months of January and February of 1952, would your answers be the same as they were in explaining what these pages contain?

(Testimony of Jack M. Rolls.)

A. Yes, I think they would. I haven't looked at them thoroughly, each one, but I presume that each one discloses the same information.

Q. Does Bay Counties Title and Insurance Company have any record—

Mr. Carey: I object to that. There is no such company as Bay Counties Title and Insurance Company.

The Court: Do you want to change it to the Petitioner?

Mr. Boyle: Yes.

Q. (By Mr. Boyle): Does the Petitioner have any record which will show the specific title reports or title insurance policies purchased from any particular broker? A. No.

Q. There is no record in existence which will show from whom any particular title report or title insurance [137] policy was purchased, is that correct?

A. Other than the reference in each preliminary report to whom it is addressed and even that might not be correct as to from whom it was received.

Q. How many of these preliminary reports or policies did Bay Counties purchase in 1952?

A. I really don't know. I don't recall.

Q. In 1953 or 1954?

A. I don't recall any of the years. Of course, it's been accumulated over a period of time and it would be a problem of segregating them and all.

(Testimony of Jack M. Rolls.)

They pile up to a point and then they go through them so there's really no way to say.

Q. Approximately how many escrow transactions did the Petitioner handle in 1952?

Mr. Carey: I object to that on the grounds that the records will show that.

Exhibit E in evidence, it has been testified, would show every escrow that was handled in each month of 1952, 1953 and 1954.

The Court: Is that what Exhibit E will show?

Mr. Carey: From every source, is that correct?

The Witness: Not necessarily. That is merely a record of real estate transactions. We handle accommodation escrows and other escrows, so the volume of orders that you [138] are talking about would not coincide with that either, you see, and I couldn't give you those figures because I'd have to go back and check the books.

Q. (By Mr. Boyle): As a general rule, did the title report or title policy which you acquired relate to the property involved in the specific transaction or escrow transaction being handled at that time?

A. Sometimes yes, sometimes no. I mean it is, as I say—we requested and have always done it up to—we still try to get them but we don't make as concerted an effort due to the fact that we have acquired so many of them over a period of time.

Q. Would you say that the bulk of the reports and policies you have acquired or did acquire in the years before the Court, would you say that the

(Testimony of Jack M. Rolls.)

bulk of those did not relate to any specific escrow transaction? A. Oh, yes.

Q. You would say that they did not relate?

A. Did not relate.

Q. If this particular report or policy did not relate, how did you know that you were not buying a duplicate of something you already had?

A. We could have bought duplicates. However, you see, the peculiar thing is this: That merely adds strength to the [139] records that you already have. In other words, if you have a record or report dated in 1948 from California Pacific Title Insurance Company and subsequently we get a duplicate report from—or a policy, from City Title Insurance dated in 1953, true, there is a duplication. However, there is a gap in there which they have covered and it merely brought our plant more current, you see.

Your Honor, can I do a little explaining in connection with these reports? I think what you are getting at——

Mr. Boyle: Unless your Honor wants it, I am finished. Unless you want him to go ahead, I would just as soon go on.

The Court: Can you make a note of what you want to explain and perhaps go into it later. This is cross-examination and ordinarily we think it is not a good idea for a witness to volunteer anything at any time but particularly not when he is being cross-examined.

The Witness: I see.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Boyle): Now, in a case where you buy a report or a policy which is not involved in a pending escrow, is it possible that that particular report or policy might not be used until 1975 or 1980? Is that possible? A. It is possible.

Q. And it is possible, too, that it may never be used in the lifetime of your company. Isn't that possible? [140]

A. Depending on what our volume of business is, yes.

Q. How many pieces of property do you understand there are in the City and County of San Francisco?

Mr. Carey: I object to that. I think that has no relevancy to this proceeding in any way, shape or form.

The Court: Objection overruled.

A. That would be merely a guess. I couldn't even hazard a guess.

Mr. Boyle: I will supply the information. They have on the real estate, there are approximately 157,000 separate parcels or lots.

Mr. Carey: If counsel is testifying now I request he be put under oath.

The Court: I can't pay any attention to statements made by counsel. I can't make any finding of fact based on statements made by counsel.

Q. (By Mr. Boyle): Mr. Rolls, did Bay Counties have a title report or title policy on every lot in the City and County of San Francisco in 1952?

A. No.

(Testimony of Jack M. Rolls.)

Q. 1953? A. No.

Q. In 1954?

A. No. [141]

May I understand that question to be sure that my answer was correct? You asked if Bay Counties Guaranty Company had either a report or policy of title insurance on every piece of property in the City and County. No. That is correct, it did not.

Q. Now, on direct examination some point was made about the fact that Petitioner had a record of the record owner of every piece of property in the City and County of San Francisco. Was that the testimony? A. Yes.

Q. Was that the answer? A. Yes.

Q. But that information did not enable you to show that the record owner had good title, did it?

A. It might, yes.

Q. By knowing the person in whose name the property rests, is that sufficient to show that he has good title?

A. Your Honor, excuse me. To get into a complete discussion of how a title insurance company operates, it would take a long, long time and the basis on which reports are made. Yours is a question which becomes quite involved. I could go in and explain the procedure.

Q. From some place in the petitioner's books and records, you know who is the record owner of each piece of property, isn't that what you testified to? [142] A. Yes.

(Testimony of Jack M. Rolls.)

Q. Could you recommend the issuance of a title insurance policy on that information alone?

A. Oh, no.

Q. No, you could not?

A. No. Or, excuse me. If you wanted to, you could. A prudent——

Q. You do not?

A. ——company insuring titles does not do that.

Q. What additional information is necessary to issue a title insurance policy?

A. A complete search of the records affecting the particular piece of property involved, together with the search of the records of the ownership so the individuals who have had ownership of that property over a period of years and examination of all of those documents, instruments, that affect——

Q. That is called abstracting the title, is it?

A. That is abstracting it. It can be, if an abstract is made of each document, yes.

Abstracting is making a copy of each recorded document.

Q. And then searching?

A. No, the searching is locating the documents and abstracting is copying those documents. [143]

Q. What do you call the opinion that the title is good down to the last grantee?

A. That is the examiner's report of title and is the basis on which a preliminary report is issued by the company, stating that as of a certain date a particularly described piece of property is vested

(Testimony of Jack M. Rolls.)

in a certain name subject to certain objections or clouds on the title which can be of various nature.

Q. Does a title report or title policy serve the same purpose as the work of abstracting the title? I mean, did you not testify that it is not necessary to abstract the title back beyond a title report or a title policy that you already have acquired?

A. That is true in some cases, yes.

Q. Well, then——

A. That is what we call a starter.

Q. So your starter serves the same purpose as if someone were put to the effort of abstracting the title back beyond that, is that correct?

A. That is correct.

Q. However, if you do get a starter it is always necessary to bring the state of the title up to date?

A. Bring it current.

Q. Is that correct? A. Correct. [144]

Q. Now you have some 33 employees, you stated. How many of those people are involved in searching title for abstracting?

A. Well, now, that are involved in—well, it all goes in as part. In other words, maintenance of plant, searches and all the rest is all part of it.

Q. Just approximately. A. 13.

Q. Now, the salaries to those people and the other expenses involved in their work are considered as current expenses of the business, is that correct? A. Yes.

Q. Are you familiar with the MacInerney Act?

A. Yes.

(Testimony of Jack M. Rolls.)

Q. That refers to the fire and the earthquake, right? A. Correct.

Q. Now, did you testify that Petitioner ceased making payments to brokers in about 1955?

A. I didn't testify anything.

Q. Does Petitioner still make these payments to brokers? A. No.

Q. When did they cease?

Mr. Carey: I object. That has no relevancy to this case. We are concerned with expenditures 1952, 1953 and 1954. It is admitted by everyone that they were made in those years. [145] The testimony is for that purpose.

The Court: Objection overruled.

Q. (By Mr. Boyle): Why did you stop making these payments?

Mr. Carey: I object to that on the ground that it calls for a conclusion of the witness.

Mr. Boyle: I believe this witness——

The Court: He is qualified to answer that question. Objection overruled.

A. Because as I recall, the problem came up with the gentleman from the Internal Revenue Department. We just stopped from that time on until this thing is decided.

The Court: That would be in what year?

The Witness: I think it was 1955, sometime in 1955.

The Court: Since this audit was made and these deficiencies determined, you have stopped making payments to real estate brokers?

(Testimony of Jack M. Rolls.)

The Witness: Once the gentleman from the Internal Revenue Department came in and raised the question on the thing, we stopped immediately, right now.

The Court: That would be in 1955?

The Witness: As I recall, I am not positive of that, your Honor. [146]

Q. (By Mr. Boyle): Does the importance of whether you acquire these preliminary title reports or title policies turn upon whether they are allowed as a deduction to you? That is, does the payment to brokers which you have alleged is for the purchase of preliminary title reports and policies, do those payments—or does the importance of making that purchase and acquiring these reports turn upon whether or not you are going to be allowed a deduction for making those payments? Am I confusing you, Mr. Rolls?

A. In other words, are you asking the question—I have got lost, your Honor, there. But perhaps—see if I can get your thought.

The Court: You may in this instance question counsel. We don't ordinarily do that but you don't understand the question. Tell him what you don't understand or ask him to repeat the question.

The Witness: Are you asking if it is still important as far as we are concerned that we be able to purchase these reports?

Mr. Boyle: That is one question, yes.

The Witness: Yes, it is.

(Testimony of Jack M. Rolls.)

Q. (By Mr. Boyle): Why did you stop making those purchases then when the Internal Revenue entered the picture?

A. Because a question was raised and we weren't [147] going to involve or obligate ourselves or have any additional problems until this is determined. That is one reason we are in Tax Court, your Honor.

Q. In other words, if you are not allowed this deduction you just won't buy reports, title reports or title insurance policies, any more? Is that right?

A. We may be able to find some other way of doing it. That I don't know. We will have to have some determination on that, of course.

Mr. Boyle: I only have a little more.

The Court: I understand, Mr. Rolls, that you are interested in whether this Court will make a determination that no part of these payments in the taxable years constituted rebates in escrow fees to brokers?

The Witness: Or a capital expenditure, your Honor.

The Court: Well, now, you could and might continue to make these payments for preliminary reports whether or not you could expense them or had to capitalize them. Isn't that right? Counsel has just asked you about whether or not you discontinued making these payments at some point and you said you did when the revenue agent came in and that was sometime in 1955.

(Testimony of Jack M. Rolls.)

The next question is: Well, don't you need these preliminary reports and you say yes. And then the next question: Why did you stop making the payments that are [148] involved here or the type of payments that are involved here, and your answer was that you decided not to make any of these payments of this kind until after this matter is decided in the Tax Court.

Do you mean to say that if we should hold that payments of this type have to be capitalized that you will not make them any more?

The Witness: I don't hold that, your Honor, but we'd like a determination of exactly what our position is going to be in respect to purchasing those reports.

The Court: Yes, you may want to know that for purposes of accounting and tax deductions on your returns.

The Witness: That is correct.

The Court: Am I to understand that apart from that you are interested in getting this Court to decide whether the payment in question in fact represented rebates of escrow fees? Is that why you are interested in this case in this Court?

The Witness: No, your Honor, we contend that they are not. We have contended all along that they are not. That is the Government's position, that is not our position.

The Court: 1955 apparently is the time when this audit was made. This is getting toward the end of 1958. That is three years. In the meantime, since

(Testimony of Jack M. Rolls.)

1955, have you been able to get any preliminary reports? [149]

The Witness: Yes, your Honor.

The Court: How did you get them?

The Witness: On an understanding that they would give them to us——

The Court: Gratis?

The Witness: Gratis until such time as we would be able to make some determination of payment for them.

The Court: Your next question.

Q. (By Mr. Boyle): Mr. Rolls, I show you Petitioner's Exhibits 2 and 3 in evidence and ask: Do either of those exhibits show from whom the preliminary report or title insurance policy was acquired? A. No.

Q. Does it show the amount paid? A. No.

Q. Does it show when the Petitioner acquired those reports or policies? A. No.

Q. Now, in my opening statement I said you had no way of assembling, identifying or screening these reports or policies and I was referring to the issue in question here, whether you could do so with regard to the acquisition of those reports or policies from any particular broker. Your testimony is that you cannot relate any policy or any report [150] to any particular broker. Isn't that correct?

A. That's correct, yes, because once they are integrated in our system I have no way of going back and recalling from whom we got them.

(Testimony of Jack M. Rolls.)

Q. Mr. Rolls, what differentiates, if it does, the type of information which you acquired and placed in your plant in 1947 through 1951, and the type of information which you acquired in the years 1952, 1953 and 1954, specifically this type of information on these preliminary title reports or policies?

The Court: What is the question?

Mr. Boyle: What differentiates the information, that is, the reports and the policies prior to 1951 and after 1951?

The Court: There might not be any differentiation?

Mr. Carey: What difference would that make? I think it has no relevancy.

Mr. Boyle: They said they capitalized it prior to 1951 and they did not do so afterwards.

The Court: Did you capitalize these amounts prior to 1951?

The Witness: Yes, your Honor.

The Court: Why don't you just ask him a direct question as to why he did. Why did you capitalize the payments in question prior to 1951 and then expense them after 1951? [151]

The Witness: Well, your Honor, let me explain it this way. As I originally did in connection with our competing for title insurance business in San Francisco. In order to equally or semi-equally compete with the other title insurance companies in San Francisco, when we first opened our business they, as I originally said, said that we would not

(Testimony of Jack M. Rolls.)

last six months. We had the opportunity of being able to write title insurance and subsequently started our title plant. The other companies threw up to the lending institutions in this area and to prospective clients the fact that we did not have a title plant. In furnishing a financial statement to various lending institutions in connection with our business, in order to request that they accept policies of title insurance issued through our office, if they did not see, and our initial ones in the beginning of 1947 did not show any amount for title plant, they said then, "Well, you don't show any amount for title plant. How do we know that you have one?"

So we voluntarily started to capitalize our title insurance plant or our title plant at that time. I believe that from the point of view, as Mr. Bass originally pointed out, if we wanted to do what they call hat searching, we could insure titles without a title plant.

The Court: What kind of searching? [152]

The Witness: Hat searching, doing searching of records without the benefit of a title plant.

The Court: All right. You gave that explanation before. So that enabled you to show an amount on your balance sheet for your plant?

The Witness: Right.

The Court: Well, now, get back to counsel's question. That was the reason why you say you capitalized these expenditures up until 1951.

The Witness: Right.

(Testimony of Jack M. Rolls.)

The Court: Why didn't you continue to capitalize them?

The Witness: Because at that particular time we had arrived at a capitalization of \$25,000 which was our originally incorporated capital stock amount and according to the Insurance Code requirements as far as title insurers are concerned, the maximum that they can capitalize is 50 percent of their capital stock and we felt that we might——

The Court: Go over your 50 percent?

The Witness: Over 50 percent as just a title company and we felt that we would limit it to our capitalization because we might be getting into a problem with the Insurance Commissioner, being an underwritten agency, if we went over that. We weren't sure.

The Court: All right. [153]

We will go back to Mr. Boyle's question. Was there any difference in the nature of your records before 1951 and after 1951?

Mr. Carey: I think if the Court please, that was not the question.

The Court: That is what he is trying to get out. He asked how he could differentiate.

Mr. Carey: Between the title information that you acquired when you capitalized it and the title information you acquired when you expensed it.

The Court: All right. That is the question.

The Witness: There was really no differentiation as far as I was concerned, your Honor. It continued to be an expense.

(Testimony of Jack M. Rolls.)

The Court: The information was just the same?

The Witness: The information was just the same. It was maintaining a current plant, your Honor.

The Court: That information you considered as maintaining?

The Witness: Yes, your Honor.

The Court: An established plant?

The Witness: Can I expand on that particular thing a little bit as to why these reports should not be considered as a capital expenditure?

The Court: This is argument and if your counsel [154] wants to add to your opinion about it he will ask you, but in the Court proceeding the witness isn't supposed to volunteer these things. It delays us, for one thing.

What other questions have you, Mr. Boyle?

Mr. Boyle: That is all. Thank you, your Honor.

Mr. Carey: I have just a couple of questions.

The Court: Do you want to give your witness an opportunity to get this off his chest?

Mr. Carey: Yes, I am going to.

Redirect Examination

Q. (By Mr. Carey): Mr. Rolls, would you explain, as an expert in the title business, why the cost of acquiring preliminary reports and title insurance policies to use as starters is a proper current expense or expenditure for plant maintenance as opposed to a capital expenditure to build a plant?

(Testimony of Jack M. Rolls.)

A. Well, the building up of a plant may take ten years or twenty years, depending on the requirements and the individuals involved, but this particular situation is what I was trying to get at, your Honor, is this: That is, if our company wanted to, which we did in many cases when we were not overly busy, put our searchers to work searching back the records for pieces of property in San Francisco and bringing them up current as of that particular date when they were doing the work, so that when we got an order on that [155] particular piece of property we would have a current record as of a certain date and they maintained those records currently right on up. The basis of that is the fact that that does not have to be done. They do not take the time of a searcher. Perhaps we paid—as you asked me a moment ago for a specific amount, Mr. Boyle. Perhaps we paid \$50 for a preliminary report of title or a policy of title insurance. If that were, say, three years old, back in 1955, we could use that as a starter and not have to go back from 1955 perhaps to 1906, which would involve hours of time of a searcher to do that and the cost of a searcher averages about \$2.50 to \$2.75 an hour and a full time search will take anywhere from—we have had them as high as 10 or 15 hours or better than that. So that perhaps the payment of a \$50 fee for one report which would eliminate the cost of going back, you see. Therefore, it cuts down our operating expense and it maintains our plant current on that basis as of that particular time.

(Testimony of Jack M. Rolls.)

Q. Mr. Rolls, a point was made that you might buy a particular insurance policy or preliminary report today and pay for it \$50 but that you might never issue a title insurance policy on that particular piece of property. Your answer was that that was correct, that you might never use that particular piece of title information.

Now, would your answer be the same with regard to the abstract of a deed that is filed today in the office of [156] the County Recorder of the City and County of San Francisco, that you might well never use that information that could be obtained from that deed?

A. That is true. In other words, if you don't have a title plant which is maintained by your current recordings, and no title company in San Francisco regardless of how long they have been here has ever had a search on every piece of property in San Francisco. In other words, your permanent cost of maintaining your plant—again you could say it was a capital expenditure because you may never use them. It is an operational hazard.

Q. Would your answer be the same as to the records you are taking currently from the Court in San Francisco, from the Recorder's Office in San Francisco and these records that are daily occurrences. Some of those may never be used by you, is that correct?

A. That is correct.

Q. But as a practical business matter you have to have them, is that correct?

A. Yes.

(Testimony of Jack M. Rolls.)

Q. Mr. Rolls, I believe the question was asked you concerning the reason for your ceasing to buy preliminary reports and title insurance policies. How large a deduction did you take in 1952 for this purchase of preliminary reports and title insurance reports? [157]

Mr. Boyle: That has been stipulated to, Counsel.

Q. (By Mr. Carey): What effect, if any, would the size of that deduction have upon your administrative decision to purchase or not to purchase—I mean assuming that you could not deduct that amount of money, would it have any effect upon your decision whether to buy these reports or not?

A. No.

Q. If you are not allowed to deduct them, you would continue to buy them?

A. We would have to capitalize them if necessary. I mean these people are giving them to us gratis now.

Q. I believe you testified, Mr. Rolls, that prior to 1951 you paid commissions to real estate brokers?

A. Yes.

Q. What commissions to real estate brokers, if any, did you pay after 1951? A. None.

Mr. Carey: That is all.

Mr. Boyle: I just have one question.

Recross Examination

Q. (By Mr. Boyle): Did you pay your searchers the same salary whether they are searching or they are not searching?

(Testimony of Jack M. Rolls.)

A. They are on a monthly salary. [158]

Mr. Boyle: That answers it. That is all.

Mr. Carey: That is all, Mr. Rolls.

The Court: All right. You may step down.

(Witness excused.)

Mr. Carey: I would like to call Joseph S. Rogers.

Whereupon

JOSEPH S. ROGERS

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name and address for the record.

The Witness: Joseph S. Rogers, Peart, Baraty and Hassard, 111 Sutter Street, San Francisco 4, California.

Direct Examination

Q. (By Mr. Carey): Mr. Rogers, what is your occupation? A. Attorney-at-law.

Q. How long have you been an attorney-at-law?

A. Sixteen years with the exception of World War II and the Korean War.

Q. You are a member of what bars?

A. California, San Francisco, American, Tax Court, and one or two others perhaps.

Q. What relationship, if any, do you have to the Petitioner in this case? [159]

(Testimony of Joseph S. Rogers.)

A. We are the General Counsel for the Petitioner, Bay Counties Guaranty Company.

Q. How long have you been General Counsel?

A. Since its incorporation in 1946.

Q. What other, if any, people dealing with real estate do you represent?

A. Yes. We represent Pacific Coast Title Insurance Company of Utah and California, and we represent Multiple Listing Service of San Francisco.

Q. Did I understand you to testify that you were in the Korean War? A. Yes, that is right.

Q. During that period of time you did not give any advice or did not represent the Petitioner?

A. No, that is correct. So I was in the Korean service and completely separated from the practice of law during the period of—

The Court: All right. That will do. I understand. He is a lawyer admitted to practice. What questions do you want to ask him?

Q. (By Mr. Carey): Directing your attention to Petitioner's Exhibit 4 in evidence, do you recall the occasion for acquiring possession of that or a copy of that ruling, Mr. Rogers?

A. I do. [160]

Q. What was that occasion?

A. There was some discussion concerning the purchase of preliminary reports or policies of title insurance from brokers or lending institutions and before we continued we wanted to have a determination by an official of the State of California as to whether or not the purchase of preliminary re-

(Testimony of Joseph S. Rogers.)

ports or policies of title insurance would be in violation of any California statute. I had learned that such an opinion had been rendered at the request of Senator Thompson and I obtained a copy of that opinion.

Q. Is that a copy of the opinion which you have in your hand which is Petitioner's No. 4?

A. It is a copy, a photographic copy of the opinion signed by Mr. Bernard Czesla who is in the office of the Legislative Counsel, Mr. Ralph N. Kleps.

Q. Was Ralph N. Kleps the Legislative Counsel during the period in question?

A. Yes, he was.

Q. Was Mr. Czesla, to your knowledge, one of his deputies? A. He was.

Q. Based upon this opinion and other opinions, did you give your client some advice concerning this practice of purchasing preliminary reports and title insurance policies from real estate brokers? [161]

Mr. Boyle: Whether he did or didn't would be completely irrelevant and immaterial. Whether he did or not advise them wouldn't make any difference to this case.

The Court: Objection overruled. You may answer the question.

A. Yes. Based on this opinion and other factors we did give such an opinion to our client.

Q. (By Mr. Carey): What was your advice?

A. Our advice to Bay Counties was that their acts in conformity with this letter of opinion writ-

(Testimony of Joseph S. Rogers.)

ten to Senator Thompson were not in violation of any California statute.

Q. Did you satisfy yourself that this opinion had actually been rendered by Mr. Kleps's office?

A. I did.

Mr. Carey: That is all, Mr. Rogers, at this time.

If the Court please, I will offer this Petitioner's No. 4 in evidence.

Mr. Boyle: I object to the introduction of Exhibit 4 for identification in evidence. It is irrelevant and immaterial and has no probative value because it is not based on the facts of this case but on some other hypothetical situation. Furthermore, it is hearsay. The man who wrote it is available. He is in the state and could have testified. We had no chance to cross-examine him with regard to that. [162] In the third place, it invades the province of the Court. It is up to this Court to determine what, if any, violation there has been and it would be of no value for that reason.

The Court: I don't think it is up to this Court to decide whether there has been a violation of this statute. I think there seems to be at issue in this case under one of the questions and it is up to the parties to present evidence on the question.

Mr. Boyle: I don't believe that would do it.

The Court: The question may not have anything to do with whether they violated a statute. By the way, what is the statute? Would you read it? Is it short, could you read it into the record?

(Testimony of Joseph S. Rogers.)

Mr. Boyle: I did read it in my opening remarks, verbatim. I will repeat it if you would like.

Section 12404 of the California Insurance Code. It talks about prohibited commissions.

“No title insurer, no controlled escrow company, and no underwritten title company shall pay to any person who is acting as agent, representative, attorney or employee of the owner, lessee, mortgagee or of the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, or any part of its fees or charges or other consideration as an inducement for or as compensation on any title insurance business or any escrow or [163] other title business in connection with which a title policy is issued.”

That is the end of the quotation. Actually this particular law falls under Sections 12401 through 12412 of the Insurance Code. I merely read one pertinent section of it. There are also provisions for criminal penalties and so forth.

The Court: One question in this case appears to be whether, during the taxable years, the taxpayer made any payments which constituted refunds of escrow charges. The escrow charge is made to a person who is a party to a real estate transaction.

Now, let me ask you, Mr. Rolls—just stay where you are—you have in your business closings?

The Witness: Yes.

The Court: Who do you represent, the seller or the buyer?

The Witness: We represent all parties.

(Testimony of Joseph S. Rogers.)

The Court: Who pays the escrow fee?

The Witness: The purchaser.

The Court: Of the property?

The Witness: Of the property, right.

The Court: This provision of the California Code prohibits the refund of a part of an escrow fee. Isn't that right? [164]

The Witness: That's right, yes, your Honor.

The Court: You are claiming here that none of your expenditures in the taxable years constituted refunds of escrow fees?

The Witness: That's right, your Honor.

The Court: That is a determination that was made by the Commission. That is the reason he gave for disallowing these deductions?

Mr. Carey: That is correct.

The Court: You are denying that these amounts constituted rebates of escrow fees, aren't you?

The Witness: That's right, your Honor.

The Court: The question that I have, Mr. Boyle, is whether any of these amounts constituted rebates of escrow fees. That is all I have to determine.

I am not going to make any determination—I don't have before me a question of whether there has been any violation of California statute. That is maybe drawing the line a little fine but I just thought I would point that out to you. If you want to argue this—Exhibit 4 is admitted in evidence over Respondent's objection.

(Petitioner's Exhibit No. 4 was received in evidence.)

The Court: Of course, if the taxpayer was—you know what the Lilly case is? [165]

Mr. Boyle: Yes.

The Court: All right. In the Lilly case it may have been admitted that there were rebates to doctors for referring business to opticians. It may all have been admitted. The question was whether an expense of that kind was deductible as an ordinary and necessary business expense. The Supreme Court held that it was. The Tax Court held that it was not. If you want to find out whether the Lilly case would apply here, you might bring in this matter of the California statute, but I would feel that you would have to prove—if you have a question of whether there has been a violation of California statute here, you would have to prove it here in the Court room, and not just argue it on briefs.

Mr. Boyle: If the Court would make a basic finding that they were paying commissions, that these payments to brokers after 1951 were the same as before, then the Court could find that the payments were not actually for buying any documents but were a part of the escrow fee, and if that were so it would seem the next step would be for the Court to say that that violates the statute.

The Court: You are not proving that it would violate the statute. You are not bringing in anyone to testify as to what a violation of that statute is. You want me to decide what a violation of the statute would be.

Mr. Boyle: The only question for you would be whether they were actually making a kickback or

a rebate. The statute is clear. The Petitioner says he was not doing that, he was buying something. If the Court finds that was not actually the case, that he was not buying anything but was making a percentage payment of an escrow fee, that would seem to be clearly a rebate or kickback under the local law. That is the first question.

The Court: You consider, Mr. Boyle, one question in this case. That question is whether in the taxable years, Mr. Rolls was making a payment of a certain percentage. He is making a payment which represented a certain percentage.

Mr. Boyle: Yes, the record will show——

The Court: Of escrow fees. I have told you before that I will not have you just rely on those exhibits. I want testimony on the point. Are you going to put your agent on the stand?

Mr. Boyle: I would be very glad to.

The Court: I didn't ask you whether you would be happy or sad about it. I didn't ask you to state what your emotions on the subject were.

Mr. Boyle: I did not intend to.

The Court: Thank you. That is an answer to my question. Until you prove that these payments in issue represent a certain percentage of something, this Court will not make a finding of fact on that. [167]

Mr. Boyle: We can do that on brief.

The Court: You cannot do that on brief. Mr. Boyle, I want you to understand that I am making a ruling. I am not advising you on anything.

Mr. Boyle: May I ask you a question?

The Court: I told you, I guess early today, what my requirements would be and I mean it. That is a Court order, if not a ruling. You are either going to prove it here in the Court room or it is not going to be considered. Now, can I make myself any clearer, Mr. Boyle, or not?

Mr. Boyle: If the Court please, I say again that the evidence before the Court will show the amount of every escrow fee paid in the years under consideration.

The Court: Where is it?

Mr. Boyle: It is in Respondent's Exhibit E.

The Court: Where is it in E? How many pages are there in E?

Mr. Boyle: Twenty pages in E.

The Court: Get back away from the bench where you should be, back by the counsel table.

Mr. Boyle: Respondent's Exhibit E is a record kept by Mr. Rolls.

The Court: You have not put into this record anything more than one reference to one payment which was made in January of 1951, I think was the one that you picked out. [168]

Mr. Boyle: I asked the witness——

The Court: Your exhibit is not prepared. You are not prepared to present that to us and you are going to insist on waiting until you file your brief to make some kind of a table up. In the meantime you have an agent here in the Court room who made a report. He examined the very document that you have in your hand, which is Exhibit E. He made a calculation and an analysis from

Exhibit E. He put the conclusions and finding from that analysis in his report, and yet you come into this Court and refuse to put your agent on the stand.

Now, it is a quarter of 5:00. We will recess the trial of this case until tomorrow morning and tomorrow you will do as the Court directs. Now, that is all.

It is up to you to decide whether you are going to call a witness or not. It is also up to you to decide whether you are going to comply with the ruling of the Court, but I can tell you one thing, that my ruling is that there is not one bit of evidence that I have heard or that I can read which establishes that any payments were made at any time that constituted a certain percentage of an escrow fee. Somebody might be able to surmise that from making an analysis of an exhibit.

It might be an inference to be drawn. I might be a deduction to be drawn, but that is not the way you try a law suit. [169] You prove it here in the Court room. You give your opponent the opportunity to say, "Well, it may appear to you that this is five and this is four and five times four is twenty. But I am going to put on evidence in this case to prove to you that this is not five, and what you have here is four times four and that is sixteen, and I am going to prove it."

That is the way a lawsuit is conducted. You give your opposing counsel an opportunity to rebut what you think you are showing and you don't leave it

until you file a brief and then ask this Court to make a deduction about something.

Now, I am not—I may as well sit down and finish this—I am not willingly going to decide any question about a violation of a California statute unless somebody comes into Court and proves it. I mean, takes the witness stand and says it. I am not going to allow the Tax Court to be used as a forum in a tax case to decide that someone engaged in the real estate or title abstract business here has violated a California statute.

We are here to decide what the taxpayer's income tax liability is for 1952, 1953 and 1954. Now, in doing so we may run into a question of whether the rule of the Lilly case applies, but I am not going to make inferences from exhibits.

Now, Mr. Boyle, I think the only way that you [170] can comply with the Court's ruling on this matter is to put your witness on the stand, namely, the revenue agent. I think that is fair and if you are going to contend that your Exhibit E shows that payments made during each of the taxable years constituted a certain percentage, usually 10 percent or something like that, of an escrow fee, you make your table up tonight and you bring it in tomorrow and put your revenue agent on the stand and get it into the record.

Mr. Boyle: May we have permission to withdraw Exhibit E for the night?

The Court: You will have to do it and I want you to do it.

Now, too many judges of the Tax Court allow Tax Court cases to be presented as though we were holding more or less an informal hearing and I just won't do that and I don't think the fact that the burden of proof is on the taxpayer means that the Government never has to put on a witness and never has to prove anything. I don't go with that either. What I say is right from the standpoint of how these cases ought to be tried, but I am perfectly willing to tell you that I am driven to insist on the rule because I do not have the time to make analyses of exhibits.

Now, I have heard members of the Tax Bar complain that judges of this Tax Court decide cases on the basis of inferences, that they never mentioned a certain thing in a [171] brief and nobody proposed that a certain fact be found in a brief or nobody made an argument of a certain kind on brief, but the Court seemed to draw an inference from the evidence and so forth.

Sometimes you are obliged to because of the very thing that you have to decide requires that you have certain facts before you and if the parties have not very clearly tried their case so as to prove the necessary and essential facts, the Court is put in the position of having to draw inferences, but it is not the Court's fault.

Other than that, the Court should have insisted at the time that counsel fully try their case.

Now, I want you to take Exhibit E home tonight and make up your table and make up your analysis

and put Mr. Compton on the stand or forever hold your peace. Unless you do it right now in the Court room, don't feel free to make your argument on brief that these payments represented uniformly 10 percent of an escrow amount and therefore represented a kickback of some kind. Maybe your opposing counsel knows that this is your theory. Maybe you have discussed it with him, but it is not on the record here and what is not on the record here I neither see, hear nor think. Never heard of it. But if you get in the record these things, I will have heard of it and I will read it and I will take consideration of it.

Have I made myself clear? [172]

Mr. Boyle: Yes, your Honor, very clear.

The Court: We will recess this case until tomorrow morning at 9:30.

(Whereupon, pursuant to the order of the Court, the hearing in the matter of the above-entitled Petition was recessed until 9:30 o'clock, a.m., Thursday, October 9, 1958.) [173]

Proceedings

The Court: Have you been able to finish the schedule?

Mr. Boyle: If your Honor please, a start has been made. There is not a complete schedule, but

I will put the agent on the stand to show what he has been able to do.

The Court: All right.

Mr. Boyle: Mr. Compton, will you please take the stand?

The Court: What are our exhibits?

The Clerk: E is the last letter, and 4 was the last number.

The Court: Four has been put in evidence?

The Clerk: Yes.

H. JAMES COMPTON

was called as a witness on behalf of the Respondent and, having been first duly sworn, testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: H. James Compton—C-o-m-p-t-on—71 Berens Drive, Kentfield, California.

Direct Examination

Q. (By Mr. Boyle): By whom are you employed?

A. By the Internal Revenue Service in the [177] District Director's Office.

Q. How long have you been so employed?

A. Since 1946.

Q. Are you a member of any professional—are you a professional man? A. Yes, I am.

Q. Are you a lawyer?

(Testimony of H. James Compton.)

A. Yes, sir, I am admitted to the Bar in California.

Q. Are you an accountant?

A. Yes, sir, a C.P.A.

Q. You are a Certified Public Accountant?

A. Yes, sir.

Q. Admitted in California?

A. Not in California. Illinois.

Q. Illinois. Are you the agent that audited the petitioner in this case for the years 1952, '53 and '54?

A. Yes, I am.

Q. Were you in Court all day yesterday?

A. Yes.

Q. You heard all the testimony?

A. Yes, I did.

Q. At the close of the session last night, did I hand you Respondent's Exhibit E?

A. Yes, you did.

Q. Did you bring that back with you this morning? [178]

A. Yes, I did.

Q. Will you please hand it to me?

A. Yes.

Mr. Boyle: Mr. Clerk, I hand you in return therewith Respondent's Exhibit E and ask that you destroy the receipt, please.

Q. (By Mr. Boyle): From that exhibit did you prepare a summarization?

A. Yes, I did.

Q. May I have the summarization?

Mr. Boyle: Mr. Clerk, will you please mark these as Respondent's one exhibit for identification next in order.

(Testimony of H. James Compton.)

The Clerk: Exhibit F for identification.

(Respondent's Exhibit F was marked for identification.)

Q. (By Mr. Boyle): Mr. Compton, I hand back to you Respondent's Exhibit F for identification, which are the two sheets that you handed to me, and ask you to explain that exhibit, please.

A. Yes, Mr. Boyle. This is an analysis of the information contained on Government Exhibit E, which is the monthly record of payments made to brokers by Mr. Rolls for the years 1952 to 1954. This analysis lists in the first column the names of realtors as listed by Mr. Rolls on his monthly schedules. In the first money column it listed the [179] red totals on the schedule, which have been explained to me by Mr. Rolls to have been the amount of escrow fees earned by the petitioner during the month through the efforts of the particular broker whose names are listed. And in this second money column I listed the amounts paid to the broker by Mr. Rolls in currency.

These amounts total for each month the amount withdrawn by Mr. Rolls in column C, which my examination showed to have been charged in most of the months to advertising, and I believe there were five or six months in 1952 where they were charged to photoplant expense, on the expense account of the petitioner.

The Court: What would photoplant be?

(Testimony of H. James Compton.)

The Witness: It is an operating account, and operating expense.

The Court: What does it mean, photoplant?

The Witness: I am not exactly familiar with it. I presume——

The Court: How do you spell it?

The Witness: Photoplant expense.

The Court: P-h-o-t-o?

The Witness: P-h-o-t-o. I presume they photo the documents recorded in the recorder's office.

The Court: Photostat department, or something. All right. Go ahead. [180]

The Witness: Now, in my listing of the names of realtors——

The Court: Let me see that other set.

The Witness: ——I listed every name as listed by Mr. Rolls for the month of January and February and March in 1952, even though there was no red total and no payment paid to the broker in some instances, but I listed the names nevertheless.

Mr. Rolls explained that the abbreviation OC meant that the business transacted with the petitioner was out of city business, and apparently no payments were made to the broker because it was out of city business. I don't know any other reason.

Mr. Rolls did not explain what the check marks mean, and I am not—He did explain three years ago, but I have forgotten what they mean.

The Court: What does "Total Escrow Fee Earned" mean?

(Testimony of H. James Compton.)

The Witness: That is the total of the fees generated by each individual broker during the month.

The Court: It isn't a very clear heading.

The Witness: The petitioner's income from escrow fees earned.

The Court: On this item of \$144, would that be escrow fee payable to the petitioner?

The Witness: Yes; received by petitioner. [181]

The Court: All right.

The Witness: During the month.

The Court: On business brought in?

The Witness: That's correct.

The Court: All right. Anything else?

The Witness: In the second money column then is listed the payments made to the broker for this month.

The Court: Yes.

The Witness: Mr. Rolls has told me that he paid these columns in Column C.

The Court: And you have figured——

The Witness: I haven't verified it any other way——

The Court: You have over here, then, a percentage of the amount paid?

The Witness: That's my calculation.

The Court: You made a calculation of the amount paid of the percentage of the total escrow fee to——

The Witness: Paid to the broker.

(Testimony of H. James Compton.)

The Court: To the amount paid to the broker. All right.

The Witness: And that is rounded off, since I made it roughly in my head. It may not always work out to exactly 25 per cent, since Mr. Rolls apparently making the payments found that the payments to the broker were to the nearest dollar, both up and down. [182]

Q. (By Mr. Boyle): Does your summary cover all the months in those three years?

A. My summary only covers the first six months of 1952. I have worked on this for six hours and ran out of time since I did not have the records available before last night.

The Court: Yes.

The Witness: Mr. Whitman from the Technical Advisor in the Appellate Division did the same analysis for the first six months of 1954 under my direction.

The Court: All right.

The Witness: And I checked the other months, both since last night and three years ago. They showed exactly the same pattern that—where payments were made to brokers, they constituted 25 per cent of the total fees received through the efforts of this broker by the petitioner, and I have used Mr. Rolls' totals throughout.

The Court: All right. Anything else?

Mr. Boyle: Nothing else. I have no questions.

The Court: You may inquire.

(Testimony of H. James Compton.)

Cross Examination

Q. (By Mr. Carey): Mr. Compton, in 1955 when you made this audit—this was in 1955, wasn't it?

A. Yes, sir. [183]

Q. When you saw this record that her Honor has in her hand, you at that time came to the conclusion that the petitioner in this case had violated the California law and was paying rebate, did you not?

A. Eventually I came to that conclusion based on this type of analysis.

Q. Yes. And when you came to that conclusion, at that point it became fixed in your mind and you have consistently ignored facts to the contrary since that time; isn't that correct, Mr. Compton?

A. I have had no——

Q. No facts to the contrary?

A. No. I have had no dealings with it since September 1955. I have had nothing to do with it.

Q. In preparing this exhibit for identification, you ignored all facts to the contrary and put in there only facts that bore out your conclusion; isn't that correct?

A. I listed, as I explained, the red total amounts.

Q. No, you didn't, Mr. Compton. I believe your testimony was that that column includes totals of escrows paid to Bay counties; not the red figures, but totals of escrows paid to the Bay counties, and it does not, does it, Mr. Compton? This escrows

(Testimony of H. James Compton.)

paid column entitled "Escrows Paid to Bay Counties" is a summary of the red figures not circled on this? [184] A. Correct.

Q. You did not summarize and you did not go back and total the escrows paid to Bay counties, did you? A. No, I did not.

Q. You did not. This was a fact which was not in accordance with your preconceived notion of what this company had done? A. No.

Q. And that's why you did not do that; isn't that correct, Mr. Compton?

A. No, it is not correct.

Q. That is not correct. Mr. Compton, I notice one entry. How much is 25 per cent of six?

A. \$1.50.

Mr. Carey: May I, your Honor?

The Court: Yes.

The Witness: Incidentally, there is one realtor who received $33\frac{1}{3}$ per cent.

Q. (By Mr. Carey): Aren't there several of them? As a matter of fact, you have——

A. Consistently received $33\frac{1}{3}$ per cent, Sachs Realty Company, and I believe——

Q. But you show 25 per cent, don't you, Mr. Compton?

A. No. I showed 33 per cent. [185]

Q. Would you show me? Oh, yes, down here.

A. Sachs Realty in every month for six months of 1952 received $33\frac{1}{3}$ per cent.

(Testimony of H. James Compton.)

Q. May I ask you, Mr. Compton, why opposite Gale Wisher you show \$6, \$2, 33 $\frac{1}{3}$, and opposite Darrell Lang you show \$6, \$2, 25 per cent?

A. As I explained that, it amounts——

Q. But don't——

The Court: Just a minute. Never mind being a prosecuting attorney now. I know that the reporter cannot write down statements of two people talking at one time.

Mr. Carey: I beg your pardon.

The Court: Mr. Reporter, read back what you have of this answer.

(Answer read.)

The Witness: As I explained, the payments are rounded out to the nearest dollar, and the percentage is rounded off within five percentage points, and two per cent of \$6.00 is exactly 33 $\frac{1}{3}$ per cent. And if it had been one and a half dollars of six per cent, it would have been 25 per cent.

Q. (By Mr. Carey): Yes.

A. Since it is rounded off, there is to that extent an error. As I explained, the percentages were done by me by [186] mere observation.

Q. But—— A. Not on a machine.

Q. Isn't it correct that your percentages and your calculations here were deemed to—were done to show a pattern?

A. Well, I don't know. They do show——

Q. In your mind they could?

A. In mind they do show a pattern, that is correct.

(Testimony of H. James Compton.)

Q. You prepared that exhibit with that in your mind that they did show a pattern, and you show only those figures that do show a pattern?

A. I prepared that at the request of——

The Court: What is this? You prepared it at the request of what? Finish it.

The Witness: I prepared the summary, I believe, at your Honor's request, or at the request of Mr. Boyle.

The Court: You prepared it at the request of Mr. Boyle, and the Court directed Mr. Boyle to get his exhibit in shape so that it could be read by the Court. That's what you did.

Q. (By Mr. Carey): Did you ever inquire, Mr. Compton, as to whether such designations as OC, what they meant? A. Yes, I did. [187]

Q. Did you inquire as to whether this was—that the petitioner here received any money through these transactions?

A. Well, I inquired at two different times three years ago. Mr. Rolls explained all the symbols and marks he used on his monthly schedules, and last night I inquired of him, and he was stopped from answering my—in order to refresh my memory of what these abbreviations and symbols meant, I asked him the question, please explain to me, and I believe you or Mr. Rogers asked him not to explain.

Q. Then we also—Didn't we not tell you, Mr. Compton, later?

A. Later on somebody had suggested I call Mr. Rolls.

(Testimony of H. James Compton.)

Q. If you had any difficulties interpreting this exhibit; isn't that correct?

The Court: Read the question.

(Question read.)

Q. (By Mr. Carey): Isn't that true?

The Court: Well, go ahead.

Q. (By Mr. Carey): Isn't it true that we also informed you that if you had any difficulties interpreting Exhibit E that you were to call Mr. Rolls, and he would aid you in that interpretation?

A. That was stated later on in the hall, in the doorway.

Q. That is correct. [188]

A. That's correct.

Q. Isn't it correct that your counsel, Mr. Sears, told you that you were not to contact Mr. Rolls?

A. Yes, sir.

Mr. Carey: That is correct. I think we have no further questions.

The Court: This exhibit can be completed, Exhibit E, and totals run up on an adding machine. You may step down.

(Witness excused.)

The Court: Do you want to ask Mr. Rolls to explain this thing any further?

Mr. Carey: No, your Honor.

The Court: Do you have another witness?

Mr. Carey: No, your Honor.

The Court: Do you have another witness, Mr. Boyle?

Mr. Boyle: No, your Honor.

The Court: Then you both rest, is that it, except for finishing this tabulation for the Court?

Mr. Boyle: At the beginning of the trial, the Court requested that the parties prepare something like this and type it completely and put it in the case.

The Court: This would amount to the same thing. This exhibit.

Mr. Boyle: I offer in evidence Respondent's F for identification. [189]

Mr. Carey: No objection.

The Court: F is received in evidence.

(Respondent's Exhibit F was received in evidence.)

The Court: Mr. Rolls, you have been sworn. You can remain seated where you are.

Exhibit E and Exhibit F give us the names of many real estate brokers. Now, there probably are duplications of names. The same name probably appears more than once.

Mr. Rolls: Each month. They appear once each month, your Honor.

The Court: They appear once each month?

Mr. Rolls: Yes.

The Court: Now, in each instance did you obtain a preliminary report or some copy of the title report from that broker?

Mr. Rolls: Yes, your Honor.

The Court: Will you give us the dates for the briefs, please?

The Clerk: Simultaneous briefs will be due on or before November 24. Reply briefs will be due on or before December 24.

The Court: May I see Exhibit 4? I guess it is 4. What is 5?

Mr. Carey: There is no Exhibit 5. [190]

The Clerk: There is no 5.

The Court: No Exhibit 5.

Mr. Carey: I beg your pardon. There is an Exhibit 5, your Honor, but that was withdrawn by me with your consent to prepare a summary. It was all of the daily ledger sheets, and we were going to prepare a summary which will show just the expenditures.

The Court: Please don't withdraw any exhibits until we get to the end of the trial, because I have to make arrangements to get that exhibit back, and so forth.

Mr. Carey: Yes, your Honor.

The Court: Now, will you check Exhibit—That may have happened in connection with some others. My record is we have joint Exhibit 1-A. Didn't I check this with you?

The Clerk: Yes, your Honor. I don't see 1-A, unless it is on your desk.

The Court: Here are some returns.

Mr. Boyle: 1-A are the Articles of Incorporation, and we withdraw that to make a copy of it.

The Court: You must not withdraw exhibits during the course of the trial. Now, it's too bad to go over this with you just once, I am sorry, the system we operate under, but if I didn't stop to check this

business, I wouldn't know where my exhibits were.
Who has Respondent's Exhibit 1-A?

The Clerk: I have a receipt signed by Respondent [191] for that exhibit, your Honor.

The Court: Do you have B?

The Clerk: B, C and D are the returns, your Honor.

The Court: You have those?

The Clerk: Yes.

The Court: You have E and F?

The Clerk: Yes.

The Court: Do you have 2 and 3?

The Clerk: Well, I have 2.

The Court: Well, find 3, please.

The Clerk: Yes. I have 3.

The Court: Four is up on the bench, and 5 has been withdrawn. Do you have a receipt for 5?

The Clerk: Yes, your Honor.

Mr. Boyle: May it please the Court, is 4 that letter to the State Senator?

The Court: Yes.

Mr. Boyle: I don't recall the Court ever ruled on my objection to that. Did you rule?

The Court: I received it over your objection.

Mr. Boyle: Well, then, I note an exception.

The Court: All right.

Now, Mr. Carey, I want to ask you what the position is about these payments to the brokers.

Mr. Carey: In what respect, your Honor? [192]

The Court: What is the status of those payments and what is the relevancy of Exhibit 4 to those payments, and so forth? What is your position?

Mr. Carey: First of all, what are those payments, those are payments in purchase of preliminary title reports and/or title insurance policies from these respective brokers. These are ordinary and necessary expenses of maintaining this title plant in its current operable condition. They add nothing to the plant, but they made—are in the same category as maintaining the plant operable by photographic abstracts of title or title documents currently.

May I point out this, your Honor, that once you have one of these as of a certain date that you use, the title plant beyond that point is no good. You don't refer to it at all. You start with this preliminary report. So that it replaces something that you are currently obtaining at our expense. Insofar as that opinion is concerned, if the——

The Court: Exhibit 4.

Mr. Carey: Exhibit 4 is concerned, if the Court please, since the United States—or since the respondent here has taken the position and consistently throughout the administrative proceedings took the position, and almost exclusively the position, that we have violated the law in buying these reports——

The Court: That would be the California law?

Mr. Carey: California law—that these were illegal expenses, and under the recent cases of the Supreme Court, if they were in violation of law, not deductible because not ordinary and necessary. And, of course, when this was going through the administrative proceedings, these current cases like Tank

Truck Rentals, Inc., versus Commissioner, had not yet been decided, and the reliance of the Commissioner was upon the Lily Case.

The Court: I think you haven't finished off your thought. Now, with respect to Exhibit 4, Exhibit 4 is dated October 27, 1953.

Mr. Carey: Yes, your Honor.

The Court: And this opinion from the Legislative Council of the State of California states what?

Mr. Carey: It states several things, your Honor, that we believe that show our position in this matter.

First of all, it states that petitioner in this case is not——

The Court: It does refer to this petitioner?

Mr. Carey: No, it does not refer to petitioner. It refers to a widespread problem in the State of California and the attempt of title companies to solve the problem, and whether it — within the framework of the California law.

The Court: Well, now, it may be better—you are not looking at Exhibit 4. Maybe I had better help you with [194] this.

May I have that blue-bound book on your desk, Mr. Boyle?

Mr. Carey: I am aware——

The Court: I know that. All right. Remember that we are talking to a reporter.

It appears that paragraph, or Section 12,404 of the Insurance Code of the State of California was enacted in 1949. Is that your understanding, Mr. Boyle?

Mr. Boyle: I understand it was 1951. It was amended in '51. It was originally put in in 1949, and then they put more teeth into it in '51.

The Court: Amended in '51. Well, now, this edition would not show that at all. So I think we will have to have some agreement, for the benefit of the Court, that paragraph 12,404 of the Insurance Code, which has been read into the record twice, is the provision that existed in 1951, '52 and '53, which are the taxable years. Is that right?

Mr. Carey: That's correct.

Mr. Boyle: '52, '53 and '54 are the taxable years.

Mr. Carey: It was in existence and reads as Mr. Boyle read it into the record. The taxable years——

The Court: That provision was in the Code.

Mr. Carey: Yes, your Honor.

Mr. Boyle: Well, I think all those provisions [195] dealing with this subject were in the law at this time. It runs from 12,000——

Mr. Carey: ——401 to 12,412.

Mr. Boyle: Yes.

Mr. Carey: They read as they read in that volume.

The Court: Then on October 27, 1953, someone in the office of the Legislative Council for the State of California in Sacramento gave some opinion to a member of the Senate of the State of California, and in this opinion the problem is stated as a question, a conclusion is stated, and then the reasons are given for the conclusion.

Mr. Carey: Yes, your Honor.

The Court: Now, in the question reference is made to Sections 12,404 and 12,405.

Mr. Carey: That is correct.

The Court: And those provisions have been brought to the attention of this Court. So the person who made this opinion came to the conclusion that under 12,404 and 12,405 it was not illegal to make a payment for——

Mr. Carey: Purchase of the——

The Court: ——purchase of a document of title upon the basis of which the policy of insurance was issued.

“Thus, the cost to the insurer”—I am now quoting this opinion—“Thus, the cost to the insurer of purchasing a copy of an old title insurance policy would be a charge [196] which would be included in the schedule fees adopted by the insured pursuant to Section 12,401. The prohibition of Section 12,405 is to be rebate of any part of this fee.”

Mr. Carey: And I would like to particularly call your Honor’s attention to the first paragraph of that opinion and the concluding paragraph of the opinion.

The Court: The first paragraph on what page?

Mr. Carey: Page 1.

“You state that it has become a common practice for the newer title companies which did not have reciprocal policy exchange privileges with older companies to purchase copies of old title insurance policies or preliminary reports from real estate brokers for the purpose of facilitating their own title

examinations and thus eliminating the necessity of searching the record prior to the date of said purchase policy or report."

And the concluding paragraph:

"It therefore appears that such statements, whether or not made to a broker interested in the transaction, would not violate any provision of the insurance code relating to rebates, but would constitute a legitimate cost of doing business in procuring title information on the basis of which the policy of title insurance is issued."

The Court: That's a quotation also?

Mr. Carey: Yes, your Honor. [197]

Excuse me, your Honor. I was otherwise engaged when the Clerk told us the briefs. Do I understand simultaneous briefs, with the opening briefs, or *seriatim* briefs?

The Court: I will come back to that in a few minutes. We, under our rules, have simultaneous briefs.

All right, Mr. Boyle.

Now, sometime during the week, Mr. Boyle, you can have that schedule completed, which is Exhibit F, and is a—really, it is a copy of Exhibit E, but it's put in more readable form. It is really difficult to read Exhibit E as it stands.

When you have finished that, do you want to see it, Mr. Carey?

Mr. Carey: If I may, if the Court please, yes.

The Court: Well, then, will you make arrangements with Mr. Boyle to see it and bring it in on Monday?

Now, you can decide whether you will both come in, or whatever you want to do. I will leave that up to you.

Now, about the ledger sheet, Exhibit 5. What are you going to do with those, Mr. Carey?

Mr. Carey: We, your Honor, are preparing summaries of only the entries relating to these expenditures here in question, and they are to be complete entries. They show the check number, the date of the check, the payee of the check, the amount of the check, and the account to which credit, and [198] any explanation shown by the ledger sheet, but only as to these monthly checks relating to the cost of title reports.

The Court: Exhibit 5 is made up of the original ledger sheets in an account called Advertising Expense, right?

Mr. Carey: No. It is a daily ledger sheet of the——

The Court: Oh, it is a daily ledger.

Mr. Carey: In a single entry bookkeeping system for three years, your Honor.

The Court: All right.

We will put it this way: Exhibit 5, then, are the ledger sheets for the three years involved here.

Mr. Carey: Yes, your Honor.

The Court: In other words, you are giving us that whole accounting record?

Mr. Carey: Yes, your Honor.

The Court: Only part of it is relevant to the question we have to decide.

Mr. Carey: That is correct.

The Court: And the Court has requested that you make up a schedule from Exhibit 5 which will show just the figures that relate to the issue here.

Mr. Carey: Yes, your Honor.

The Court: Or the entries that relate to the issue here.

Now, Mr. Boyle will also want to check that supplement [199] to Exhibit 5. It will be made part of Exhibit 5. That job has to be done, and we are getting close to the week-end. I think that it would be better if you both bring in these additional summary exhibits on Tuesday. That will give you a chance to have them checked on Monday. You can do your work in the meantime.

Now, one more thing. In a motion for continuance signed by petitioner on January 20, 1958, it was stated that there were pending *Hoover Motor Express Co., Inc. v. United States* in the Sixth Circuit, 241 F 2d, I guess, 459, where reference was made to *Hoover Motor Express Company* and *Tank Truck Rentals, Inc.* Each case at that time had been decided. One had been decided by the Sixth Circuit, and one had been decided by the Third Circuit, and certiorari had been granted in 1957, and you were waiting for a decision by the Supreme Court.

Mr. Carey: Yes, your Honor.

The Court: Now, I am pretty sure those cases have been decided since then.

Mr. Carey: They have.

The Court: *Tank Truck Rentals* I know has been. What is the reason for your reference to

those two cases? Now, what is your position at the present time?

Mr. Carey: Well, your Honor, as you may recall, there was a great deal of discussion in the Tax Bar on the [200] question of the deductibility of fines and other penalties paid in transacting business on those two cases. In one case, there was a deliberate violation, because they contended they could not do business otherwise, of traffic laws, load limit laws.

In the other of the cases, there was an unintentional, or a violation they couldn't help, because as a truck would be unloaded or loaded, there was no access to scales. They would violate the load limit on certain axles, and so forth, and be subjected to fines because of that.

The Supreme Court had never directly ruled upon this question.

Now, we asked for a continuance because if the Court had ruled that even though they were—the activities were illegal under State law, that if they were otherwise ordinary and necessary, then a long line of lower court decisions would have been overruled and——

The Court: How did the Supreme Court decide Hoover Motors?

Mr. Carey: They decided both of them that fines and penalties made by taxpayers were not ordinary and necessary business expenses and were not deductible.

The Court: All right.

Mr. Carey: They might have helped us, but we don't believe they hurt us.

The Court: They don't help you. [201]

Mr. Carey: They don't help us, but I don't think they hurt us, either.

The Court: Very much.

Have you given us the dates for the briefs?

The Clerk: Yes. November 24 and December 24.

The Court: Well, you both file your original briefs on the first date, and you both file your reply your reply briefs on the next date.

Mr. Carey: Thank you, your Honor.

The Court: Thank you very much for your compliance with the various requests of the Court. That concludes the hearing of the case of Bay Counties Title Company. The Clerk will have a few things to do with the exhibits.

We will take a short recess before calling the next case.

(Whereupon, pursuant to the order of the Court, the hearing in the matter of the above-entitled petition was adjourned indefinitely.)

[Title of Tax Court and Cause.]

Proceedings

The Clerk: Docket 63623, Bay Counties Title Guaranty Company.

Mr. Boyle: If your Honor please, as you will recall, the Respondent has to file Exhibits E and F, the

photostatic copies of the Exhibits E and F, and we are prepared to do that. And I believe the Petitioner has Exhibit 5 also to file.

The Court: May I see Exhibits E and F?

Mr. Boyle: Yes, your Honor.

The Court: If I recall, Exhibit F was made up from Exhibit E. Is that right?

Mr. Boyle: That is correct. There should be no reason to refer to Exhibit E except in order to check the method or the manner in which the agent computed it.

The Court: Well, for the record, Exhibit E was an original record kept by Mr.——

Mr. Carey: Rolls.

The Court: And Exhibit F is a transcript of Exhibit E, setting forth the names and figures on Exhibit E in columnar form, with appropriate headings at the top of the columns. So because Exhibit E would have been too difficult to read and Exhibit F can now be read, also you have totaled columns on Exhibit F.

Now, let me see about the period covered. We [205] begin with the year 1942——

Mr. Boyle: '52, your Honor.

The Court: I mean '52; and we have the year '53—is this next supposed to be '54?

Mr. Boyle: And through '54, through December of '54.

If your Honor please, we would——

The Court: Mr. Carey, are you satisfied that Exhibit F properly reflects Exhibit E? Are you going

to have a photostatic copy, or are you going to be able to check it?

Mr. Carey: They have supplied me with a photostatic copy so that I can check it.

The Court: Then, let's let it stand this way: If you should find any errors when you make your check, and you should stipulate with Respondent's counsel what I am to correct on the Court's copy of Exhibit F, you can enter into a stipulation and just send it up with a motion to receive the stipulation; and the motion would be granted, and then I would make any correction that I had to make on Exhibit F.

Exhibit F has been admitted in evidence, Exhibit E has been admitted in evidence, and over the interval the photostatic copies were to be made. I think that Exhibit F had not been completed the other day during the trial, I had [206] requested that something be done, and it just couldn't be completed; is that correct?

Mr. Carey: That is correct.

Mr. Boyle: Yes.

Is this copy easier for you to read, your Honor, this original copy? If it is, we could leave the original of Exhibit F with the Court.

The Court: Do you need the original?

Mr. Boyle: No, we do not.

The Court: And you can work with your copy?

Mr. Boyle: Yes, we can.

The Court: Well, then, leave the original and the photostat. Then, if I am in doubt about anything, I can refer to the original.

And at the appropriate time you can ask to have this returned to you.

Mr. Boyle: Yes, your Honor.

The Court: We don't return exhibits *pro forma*; the parties have to request that Exhibit be returned. Keep that in mind. Otherwise these exhibits will stay in Washington for an indefinite length of time. The Court has to operate in that way because of the expense of postage. Our postage cost is one of our very highest expense items. So the reporters have to take care of the postage, I believe, to return exhibits. [207]

Is there anything else about these two exhibits?

Mr. Boyle: It would probably be preferable to put in one more summary which the agent has prepared in order to make those totals come out to the amounts disallowed; and that is necessary because the payments were made in the month following the month of the escrow transaction. Therefore, it may be necessary to have the Revenue agent explain that.

The Court: Well, that carries the whole idea that the Court had through to the end. It is this summary that will be the most helpful, I expect.

Yes, I would like you to show that to Mr. Carey——

Mr. Carey: I have a copy of it, your Honor.

The Court: All right, do you want to have the agent take the stand?

Mr. Boyle: Will you take the stand, Mr. Compton.

The Clerk: He has been previously sworn.

Whereupon

H. JAMES COMPTON

heretofore called as a witness on behalf of Respondent, having been previously sworn, testified further as follows:

Further Direct Examination

Q. (By Mr. Boyle): Mr. Compton, I show you a document——

Mr. Boyle: Would you mark this for identification, please, the exhibit next in order. [208]

The Clerk: Exhibit G for identification.

(Respondent's Exhibit G was marked for identification.)

Q. (By Mr. Boyle): Mr. Compton, I show you Respondent's Exhibit G for identification and ask, did you prepare that document?

A. Yes, I did.

Q. Would you please explain it?

A. This is merely a listing of the totals contained on the large Exhibit F, arriving at an annual total which agrees with the amounts disallowed in the 90-day letter.

Q. Directing your attention now to this adjustment in December of 1952, and also December of 1951, would you please explain why those adjustments were necessary?

A. The total for December 1952, as shown on Exhibit F, was paid not until January 1953, and therefore the disallowance took place in the 1953 total. And the same is true with respect to De-

(Testimony of H. James Compton.)

cember 1951, the payment was made in January 1952, whereas Exhibit F does not contain a listing of December 1951.

Q. Therefore, were those adjustments in Respondent's G for identification—the totals on Exhibit G for identification now conform with the totals disallowed in the statutory notice, is that right? A. Yes, they do. [209]

The Court: Let me see if I get that.

The Petitioner, Bay Counties, keeps its books on a cash basis?

Mr. Boyle: On the accrual basis. But, if your Honor please, the escrow transaction would occur in one month and the real estate broker would be paid in the following month.

The Court: Well, that would—this Exhibit G for identification looks as though you are handling this on a cash basis.

Mr. Boyle: Well, for this purpose it doesn't matter, because it was disallowed as if it were on a cash basis, it was disallowed in the month paid. But Mr. Rolls' personal records would show the broker to whom the amount was paid on the prior month.

The Court: Just hold that a minute.

Exhibits E and F show the payments that were made by Bay Counties?

Mr. Boyle: That is correct.

The Court: And your examination satisfies you that usually the payments were made after a closing, usually the next month?

Mr. Boyle: I think that is a fair statement.

(Testimony of H. James Compton.)

Is that so, Mr. Carey?

Mr. Carey: Of course, we disagree with your interpretation [210] of what this was. But it is true that if you were to examine E and F and relate them to the checks drawn by Bay Counties, that the check would be drawn in the succeeding month. And I presume the payment would have taken place in that succeeding month, insofar as I know, or thereafter.

The Court: In making the determination, that has been made by the Commissioner, you disallowed a total amount of payments which actually were made in the years '52, '53 and '54, and in order to do that, you took into account some items which are recorded in the month of December of the preceding year, but which are paid after December, in the succeeding year, and it is only the December item that you are interested in. So what is recorded on the book as a transaction in December '52 is included in the total for 1952 because it was paid in January, or at least after December. And correspondingly, for December '52, an item that is recorded as connected with a transaction in December '52 falls over into 1953, there is a lapover of the December item into the succeeding year—that is what you mean?

Mr. Boyle: That is true, your Honor——

The Court: I am asking you if that is what you mean.

Mr. Boyle: That is what we mean.

(Testimony of H. James Compton.)

The Court: I am trying to get the record so that I can read it, that is all. I am only repeating what you [211] said. I don't want to argue about it. If what I say is correct, that is all I want to know. So far you agree, is that right?

Mr. Boyle: I do, your Honor.

The Court: What is the "but" about it? I will give you a chance to say something later. Is that all right?

Mr. Boyle: Yes, that is all right.

The Court: All right. We do not have in our record your cancelled checks, and we don't want to have them unless we need to have them. I am again speaking now for our record, for my own use later.

I understand from Mr. Compton that he examined cancelled checks showing these payments, or not. What is the fact on that?

The Witness: I didn't actually examine the checks, but I am satisfied such a check was drawn and Mr. Rolls cashed that check. And according to Mr. Rolls, he disbursed the funds obtained monthly to the various realtors listed on Exhibit E and Exhibit F.

Mr. Boyle: He did that in currency?

The Witness: He paid that in currency.

The Court: That is right.

I want to get back to a few of the details that we were involved in with respect to this case last week. I have been hearing some other cases. I want to get a little [212] of this back into my own mind. Just hold that a minute, now.

(Testimony of H. James Compton.)

On the books in the account advertising expense, is the entry showing the checks that were drawn by Bay Counties to cover these payments that Mr. Rolls made in cash?

The Witness: (Nods affirmatively.)

The Court: On Exhibit E we find in red figures a good many items. Now, do we have in the record anywhere so far anything to show the total amounts of the checks that were drawn, that were charged to advertising expense, the proceeds of which were used to make payments in cash? And I am trying to be careful about my use of words because of the issue involved.

Mr. Carey: Yes, your Honor. That is Petitioner's Exhibit No. 5, which is the day-to-day single-posting ledger of the Petitioner's books.

The Court: All right.

Mr. Carey: Which your Honor permitted me to withdraw to prepare a summary showing only the checks which were drawn and the detail of the account charged and the date and the number of the check, and so forth.

The Court: Well, now we get to the point of comparing the figures for each of these years as shown by the advertising expense account. That would be a logical comparison to make. But I have to inquire about that matter in relation to this little point of carrying over an item from [213] December into the next year that you have been talking about. The two sets of figures may not agree.

For example, Mr. Carey's summary of Exhibit 5—is that this one?

Mr. Carey: Yes, ma'am.

The Court: That shows total checks drawn in 1952, \$6,896. Well, I find that that figure does check with the summary figure shown on Respondent's Exhibit G. And now I think I get it.

Now, are we going to need the original ledger sheets, Exhibit 5, or will this summary be sufficient?

Mr. Boyle: That would be sufficient.

Mr. Carey: I think the summary will be sufficient. That was my understanding.

The Court: Then, this summary is going to be marked Exhibit 5 in lieu of the ledger sheets.

Mr. Carey: That is right.

The Court: Will you mark this Exhibit 5 in evidence, please.

In that situation, it will not be necessary for the Court to have the original ledger sheets, and I prefer not taking them anyway.

The Reporter: Was there a previous Exhibit 5 marked and received?

The Clerk: Yes. This is in lieu of the previous one. [214]

The Court: This is in lieu of Exhibit 5.

(Petitioner's Exhibit No. 5 was marked for identification and received in evidence.)

The Court: Was there something else you wanted to cover?

Mr. Boyle: I wish to offer in evidence Respondent's Exhibit G for identification.

The Court: Any objection?

Mr. Carey: No objection.

The Court: Exhibit G is received in evidence.

(Respondent's Exhibit G was received in evidence.)

Mr. Boyle: That is all that Respondent has, except that we will file with the Court our photostatic copies of the returns which we took out.

The Court: Yes.

Mr. Boyle: Also the articles of incorporation which we photostated and will attach to the stipulation of facts.

The Court: Those are a few details you can take care of with the Clerk.

Was there something you wanted to say in connection with my summary a few minutes ago when I asked you to hold off a few minutes?

Mr. Boyle: At one point, at that point, I thought possibly I could explain it a little more quickly; but I [215] think now that it is understood by the Court and I will just say this: The cash record is a record of the corporation, and it shows the amount that the agent disallowed and the amount appearing in the 90-day letter. Exhibit E, which shows the detail of where that money went, was a personal record of Mr. Rolls. And he had marked, after he made the payment, he apparently then inserted the figures, and since the payment related to something that happened in a prior month, that is why we get the lapover at the end of those years. But it is only by way of explanation, and there

is no confusion between the parties as to the amount paid or disallowed in the years under consideration, nor any confusion on the records of the corporation, itself, as to what that amount is.

The Court: Very well. Is there anything further?

Mr. Carey: Not for Petitioner, your Honor.

The Clerk: Brief dates have been set already, your Honor.

The Court: Brief dates have been set.

We will not take care of the matter of substituting photostatic copies of the exhibits for the originals on the record. We usually do not. That is something for you to work out with Mr. Baird, the Clerk. So we can now say that the trial of this case is concluded.

Mr. Carey: Thank you, your Honor. [216]

(Whereupon, at 10:15 o'clock, a.m., Tuesday, October 14, 1958, the hearing in the above-entitled matter was closed.) [217]

[Endorsed]: T.C.U.S. Filed October 29, 1958.

[Endorsed]: No. 17050. United States Court of Appeals for the Ninth Circuit. Bay Counties Title Guaranty Co. (formerly Bay Counties Escrow Co.), Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: August 15, 1960.

Docketed: August 22, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 17050

BAY COUNTIES TITLE GUARANTY CO.
(formerly BAY COUNTIES ESCROW CO.),
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT

To the Chief Judge and the Honorable Circuit
Judges of the United States Court of Appeals
for the Ninth Circuit:

Comes Now appellant and states the points upon
which it intends to rely in the Appeal filed herein,
as follows:

I.

The Tax Court erred in determining that the preliminary title reports and old title policies purchased by the appellant in each taxable year had a useful life beyond the year of purchase which extended until such years as appellant might make use of them in its own up-to-date title abstracts relating to the same pieces of property in connection with future transactions dealing with them.

II.

The Tax Court erred in determining that the future time of use in appellant's business was problematic and indefinite depending upon when, as and if the appellant might be called upon to make abstracts of title to the same pieces of property.

III.

The Tax Court erred in determining that the old preliminary title reports and old title policies constituted additions and betterments to appellant's title plant, and the expenditure for them was a non-deductible capital expense.

IV.

The Tax Court erred in determining that the expenditures were not current maintenance expenses within the category of ordinary and necessary business expenses.

Dated: August 29, 1960.

PEART, BARATY &
HASSARD,
JOSEPH S. ROGERS,
KENNETH S. CAREY,

/s/ By KENNETH S. CAREY,
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed August 30, 1960. Frank H. Schmid, Clerk.

NO. 17051 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUTH ETTA WITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

APPELLANT'S OPENING BRIEF

RUSSELL E. PARSONS
and HARRY E. WEISS
448 South Hill Street
Los Angeles 13, Calif.

Attorneys for Appellant.

FILED

NOV - 3 1960

FRANK H. SCHMID, CLERK

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Attorneys for Appellant.

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I

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT- APPELLANT'S MOTION TO SUPPRESS	30
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II

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III

WHILE TITLE 26, U.S.C.A., §7237, SUBD. D, PROHIBITING SUSPENSION OF SENTENCE FOR THE GRANTING OF PROBATION UPON CONVICTION OF DESIGNATED NARCOTICS OFFENSES AGAINST THE UNITED STATES APPEARS TO BE FAIR ON ITS FACE, ADMINISTRATIVELY IT IS APPLIED WITH AN EVIL EYE AND AN UNEQUAL HAND IN A MANNER FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN AN UNJUST DISCRIMINATION BETWEEN LIKE OFFENDERS AND THE PRIVILEGES AND PENALTIES OF LAW.	46
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NO. 17051

IN THE UNITED STATES COURT OF APPEALS
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RUTH ETTA WITT,

Appellant,

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Appellee.

APPELLANT'S OPENING BRIEF

TO THE CHIEF JUDGE OF THE UNITED
COURT OF APPEALS FOR THE NINTH
CIRCUIT, AND TO THE ASSOCIATE
JUSTICES THEREOF, AND TO EACH OF
THEM:

STATEMENT OF THE CASE

By an Indictment returned by the Grand Jury
in the United States District Court, in and for
the Southern District of California, Southern
Division, the defendant and appellant was
charged with having violated U.S.C. Title 21,
Section 174 (illegal importation of narcotics),

in that she did knowingly import and bring into the United States of America, from a foreign country, namely, Mexico, a certain narcotic drug, namely, heroin (Tr. of Rec. p. 2).

A notice of motion for the suppression of evidence was duly served and filed (Tr. of Rec. pp. 4, 5, 6), including the motion itself and points and authorities. To the indictment the defendant-appellant entered a plea of not guilty (Tr. of Rec. p. 8).

The motion to suppress was heard on two separate occasions. After the motion was heard, the same was by the Court denied, and the cause was transferred to Judge Lindberg for jury trial (Tr. of Rec. p. 16).

In connection with the motion to suppress certain evidence, Findings of Fact and Conclusions of Law were made and filed by the Court (Tr. of Rec. pp. 34-40).

After trial by a jury, the defendant-appellant was found guilty as charged in the Indictment (Tr. of Rec. p. 28).

At the conclusion of the defense case, a motion for judgment of acquittal was made by the defendant, and by the Court denied (Tr. of Rec. p. 26).

After the verdict of guilty was filed and entered, the motion for new trial and judgment of acquittal was made by the defendant and the matter continued for hearing (Tr. of Rec. p. 27).

Thereafter, a motion for new trial was duly made and denied; a motion for judgment of acquittal was made and denied; and the defendant-appellant sentenced to imprisonment for a period of 5 years (Tr. of Rec. p. 29).

Judgment executed by the Court is found at page 30 of the Transcript of Record.

Motion for new trial is found at page 32 of the Transcript of Record.

Thereafter, a notice of appeal was duly served and filed (Tr. of Rec. p. 43)

Thereafter, a Request for Designation of Record was served and filed (Tr. of Rec. pp. 44-46), which said Request for Designation of Record included a statement of points upon which the appellant intended to rely upon appeal.

The matter is now before this Court for determination, pursuant to the record herein, which is in two volumes, including the Reporter's Transcript of the testimony taken at the trial and at the time of the hearing on the Motion to Suppress.

JURISDICTION

The jurisdiction of this Court is invoked under Title 21, Section 174. The pleadings relied upon are the indictment, a motion to suppress, points and authorities in support thereof, the judgment, the minutes of the

Court showing the order denying the motion to suppress, the transcript of the record, the reporter's transcript of the proceedings at the hearing on the motion to suppress, including the evidence taken at that time, the minutes of the United States District Court, Southern District of California, Southern Division, and all of the papers and documents lodged with this Court and incorporated in the transcript of the record, and the original file in Case No. 29041, Southern District of California, Southern Division.

STATEMENT OF FACTS PERTINENT TO THE APPEAL

The Motion to Suppress.

RUTH ETTA WITT testified she was a widow, she had two children, ages 3-1/2 and 19; she was employed at the Los Angeles County General Hospital in Los Angeles, had been for 8 years; that on or about December 26, 1959, she crossed the United States border; that she was an American citizen, born in Mississippi; it was about 9:00 p. m. when she crossed the border of Mexico into the United States; she was coming from Tijuana; after they had crossed from the Mexican side to the American side, the officer, or guard, came up to the car, asked where they were born; the driver of the car told him; then the officer asked for the driver's license; the driver was a friend, Charles Anderson. Before Mr. Anderson could get his license out, the guard jumped

in the car, pushed him over, pushed her to one side, and told both of them to put their hands on the dashboard of the car and not to move. They did that. The officer drove the car over to the side and another man came up while it was being driven slowly to the side. The officers told them to get out; they got out; there were 3 or 4 men then around the car; the officers took them inside the building (R. T., pp. 3-5). This was on the American side of the border; they told her to stand there; they stood there for a few minutes, then a lady came in; she was not in uniform; she did not identify herself; the witness did not know who she was. The officers told the witness to follow them; three of them were around her and the lady was in front leading her to another part of the building. They took her into a room; there were the three men and the woman; the lady and the witness went into the room; the men did not come into the room (R. T. pp. 5, 6, 7). The lady immediately told her to take her clothes off; she said to the lady, "Why do I have to take my clothes off?", and the lady replied, "Never mind. Just take them off," and if she didn't take them off she would. She then proceeded to take her clothing off, one piece at a time; the lady told her to do it that way. After her clothing had been taken off, the lady told her to turn around with her back facing her; she told her to stoop over, that she wanted to look up her rectum and vagina. When the lady said that she told her she was not going to do that; the lady then told her again to do it. She bent over; the lady was behind her a minute or two while her back was turned; the lady put

her hands on her body; she examined her all over; her brassiere had been left on; she reached down in her brassiere; she examined her feet, her ears, her nose, her mouth; that she did not at any time consent to the search (R. T. pp. 7-9).

It was then stipulated that at the time of the examination of Mrs. Witt by the lady officer there was no warrant of arrest in the possession of the officers nor was there any search warrant (R. T. p. 9). She was in this room for about 15 minutes undergoing this examination. The lady found a package while she was turned around; she had turned her back around; the package was in her coat pocket; it was not in her brassiere; she didn't see the package until after the lady had told her to turn around and had told her to bend over; the woman had fumbled around in her brassiere and found nothing (R. T. pp. 10, 11). After the woman had the package in her hand she made no further examination. She was taken to jail about 3 hours after she had been stopped at the border. She was not told at any time before the search took place that she was under arrest; she was not told why she was being detained; she had never been arrested before in her life (R. T. pp. 11, 12).

The witness stated she had the package in her possession prior to coming into the United States. She stated she had gone down that night to meet a friend of hers; she went to take him a package for his kids; it was the day after Christmas and as she was leaving he told her he would like to have her take this package

and give it to a friend of his at the drive-in cafeteria on the other side of Tijuana; she told him she would; she took the package and put it in her pocket (R. T. pp. 16, 17). She had driven down to Tijuana with a friend of hers, Mr. Charles Anderson. When she and Mr. Anderson arrived in Tijuana they went to the race track; the car was her sister's; the man from whom she obtained the package was a man she knew fairly well; she had known him for 15 or 20 years (R. T. pp. 17, 18).

After being in Tijuana for a period, Mr. Anderson indicated he wanted to go to the Jai Alai games, and he did; she told him she wanted to visit her friend; she went to the friend's house; his name was Hill; Cruz went with her. She had been to Tijuana two or three weeks before and had told Cruz she was going to bring some presents for his wife and kids; they made an appointment to meet (R. T. pp. 20, 21, 22).

On cross examination, she stated that she had put the package in her pocket; that she had never put it in her brassiere (R. T. pp. 22, 23).

RUDOLPH L. DALE, called in behalf of the Government, stated he was a United States Customs Inspector, was employed at the port of entry, San Ysidro, California; was on duty about 9:15 p.m., on the evening of December 26, 1959; he had some information from his superiors concerning the stopping of a 1957 Mercury, hardtop, bearing California license MNJ-592, green and white in color,

with two colored ladies in the car (R. T. pp. 35, 36). He stopped the car fitting the description (R. T. pp. 35-37); found a gentleman driving, Mr. Anderson; the other occupant was a lady by the name of Ruth Etta Witt, the defendant (R. T. p. 37). He had the information that there was a possible implication of narcotics by these persons; his information was that the car would contain two colored ladies; when he saw the car there was one colored lady and a man in it; when he stopped the car he asked them their birthplace; both said they were born in the United States; asked them if they had any merchandise purchased in Mexico, and they replied none (R. T. pp. 37, 38). He caused the car to be searched and found no contraband in it; he caused Mr. Anderson to be searched, and nothing was found on him; his supervisor ordered Mrs. Witt to be searched. Mrs. Lohman, the matron, was called after he stopped the car; he asked Mrs. Witt to roll the window up on her side, he asked Anderson to move over and he drove the car to the secondary inspection, a small area adjacent to the Customs House out of the traffic lanes; he then took Mr. Anderson and Mrs. Witt into the Customs House. He came to work about 4:00 p. m., and he had been given a Lookout Bulletin, and told to be on the lookout for this car; he was given the license number and the color of the car; the information was there would be two colored women in it. When he stopped the car there was Mrs. Witt and Mr. Anderson in it; Mr. Anderson told him that he was a Los Angeles fireman (R. T. pp. 41-43).

ANNETTA W. LOHMAN testified that she was a part-time Customs Inspectress; that on December 26, 1959, she was called to the port of entry at San Ysidro; when she arrived they had a lady for her to search; she conducted a personal search on Mrs. Witt; they have a little search room right back of the baggage room in the Customs House; she told Mrs. Witt that she was a Customs Inspectress, that she would have to remove her clothes so she could make a personal search; Mrs. Witt removed her clothing completely; she searched her clothing; she found a package wrapped in a napkin in her brassiere (R. T. pp. 44, 45); she searched her clothing and found no other contraband; she gave the contraband, in a rubber contraceptive, to a Government Agent, Mr. Gates.

On cross examination, she testified that she told Mrs. Witt to take off her clothing, if she would not they would have to take further measures and have the clothing removed; after that she removed her clothing; she was in the nude; she made a careful examination of her body; that she usually looked in the mouth and ears; she examined her ears, under her arms, looked between her legs, told her to bend over she wanted to examine her rectum; she bent over and she examined her rectum; she examined her vagina; she examined her between her toes; she found nothing on the person; she examined her eyes; she did not, so far as she remembered, appear to be under the influence of drugs or liquor (R. T. pp. 47-49). The examination took 15 to 20 minutes (R. T. p. 49).

RUDOLPH L. DALE was recalled and testified that when he first said it was 4:00 o'clock when he received the information from the Information Bulletin that he was in error, that it was about 9:00 p.m. when he received the information (R. T. pp. 54, 55).

The bulletin was received as Government's Exhibit 1.

EVIDENCE ON THE MERITS AT THE TRIAL

RUDOLPH L. DALE testified he was a United States Customs Inspector at the port of entry at San Ysidro; that on the evening of December 26, 1959, he was on duty; he stopped a 1957 Mercury, green and white, two-door hardtop sedan bearing California license MNJ-592; there were two persons in the car, a gentleman, Mr. Anderson, and Mrs. Witt; Anderson was driving (R. T., pp. 62, 63); he asked Mr. Anderson and Mrs. Witt to state their birthplaces; they said the United States; he asked if they were bringing any liquor, food or plants back; they said none; he told Mr. Witt to roll the window up and told Mr. Anderson to move over, and he drove the car to the secondary inspection at the Customs House; he asked them to get out of the car; the supervising inspector, Mr. Snyder, was on the right-hand side of the car; Mr. Anderson and Mrs. Witt were escorted into the Customs Office; Mr. Anderson was searched; no contraband was found on him; he was fully stripped for this purpose;

Mrs. Lohman, the inspectress-matron, was called and she came to the office; Mrs. Witt was in the building when she arrived; that he searched the car and found no contraband in it (R. T. pp. 63-65). The officer stated that at the time he examined the car it had crossed the border and was in the United States; that when he questioned both occupants of the car they stated they were born in the United States; he said that every car that enters the line from Mexico assumedly is coming from Tijuana; he did not ask whether they had crossed the border; after he had talked with them a moment or two he told them to put their hands on the dashboard of the car and to move over, and he drove the car to the secondary inspection; up to that time they were very cooperative. He then asked them to leave the car and he searched Mr. Anderson; he examined his clothing thoroughly; found no contraband, no narcotics; he had him strip for this examination and examined his body closely; examined his rectum, his private parts, his mouth, his ears, his hair, his feet, and found no contraband or narcotics; he did not appear to be under the influence of any drug or alcohol at the time; he answered questions promptly; said he was a Los Angeles Fireman; that Mrs. Witt was a friend and that they had just come down for the day; he then sent for Mrs. Lohman, the matron (R. T. pp. 66-68). Mrs. Lohman appeared in a matter of minutes and, so far as he knew, examined Mrs. Witt; that he searched the automobile thoroughly; he found no contraband or drugs (R. T. pp. 68, 69).

ANNETTA LOHMAN, testifying on behalf of the Government, stated she was a Customs Inspectress at the border, a part-time job; her duties were to make personal searches of women suspects detained at the border; on D December 26, 1959, she was called for a search; she supervised a search of the clothing and person of Mrs. Witt; this was done in a search room in the rear of the Customs House at the border, a room used for such searches; there were just herself and Mrs. Witt in the room; she asked Mrs. Witt to remove her clothes; Mrs. Witt did so; she had her remove all her clothing; she searched each article as they were removed; when Mrs. Witt came to her brassiere she took it off and inside of the brassiere was a small package wrapped in a restaurant-type napkin; she searched her other clothing, such as the coat and dress, and found nothing; the package was identified as Exhibit 1 (R. T. pp. 71, 72). After the search she turned the package over to either Mr. Gates or Mr. Maxey, Agents.

On cross examination, she stated that after Mrs. Witt had been taken into the room she told her that if she didn't take off her clothes her clothing would be taken off of her; Mrs. Witt then removed her clothes; she then examined her body (R. T. p. 74); she examined her mouth, ears, under her arms, looked at her rectum, examined her private parts, looked between her legs, between her toes, under her feet, and found no narcotics on her body; she did not appear to be under the influence of any narcotic or alcohol (R. T. pp. 74-76). She denied planting the package in Mrs. Witt's coat

pocket; she only vaguely remembered seeing a coat; she examined all of her clothes; she made no list of the clothing she examined; it was a sweater, blouse, skirt, underwear; she found nothing in the clothing, nothing but the package in the brassiere; the search took 15 to 20 minutes (R. T. pp. 76, 77). Mrs. Witt was cooperative after she once got her to take her clothing off; she wasn't anxious to take her clothing off, but after she was told that unless she took it off, it would be taken off of her, then she took the clothing off (R. T. pp. 77, 78).

WALTER A. GATES testified he was a Customs Agent of the United States Customs Service; had been such for 6 years; that on December 26, 1959, he went to the port of entry of San Diego; he was present at the interrogation of the defendant (R. T. p. 79); present in the room were Customs Inspectress Annetta Lohman, Customs Agent John Maxey, Mrs. Witt and Gates; Mrs. Witt stated she and her companion, Mr. Anderson, had arrived in Tijuana about 7:00 p. m. on the 26th; she said they went to the Jai Alai games, she became tired and went out to the car, rested for a few moments; she stated they had been to Tijuana once some time previous; he first talked to Mr. Anderson, and then talked to Mrs. Witt about 45 minutes later; she stated that she had been given the money for the narcotics by a man in Los Angeles by the name of Bo; that she met this Mexican in Tijuana, had given him some money and had taken the narcotics; she was supposed to deliver the narcotics to Bo at the corner of

Central and Vermont, in Los Angeles, and receive \$100; he stated that at the time Mrs. Witt was first interviewed the statement was recorded; the statement was never transcribed; he denied Mrs. Witt had told him that the package had been given to her by a friend to be given to somebody (R. T. pp. 80-86). He denied that Mrs. Witt in the second conversation told him that a package had been given to her by a friend and that she was to deliver it, and she didn't know what was in the package; he admitted that in his report he had made a statement,

"The only statement of any consequence made by Mrs. Witt during the interview was that she was to receive \$100 for making the trip, that she had been given money to pay for the narcotics, and she was then to deliver it to a person known to her as Bo at Vernon and Central Streets, in Los Angeles, California...";

that he was mistaken about Vernon and Central; Mrs. Witt told him she had been shopping, looking around the town; Mrs. Witt had told him that, under all the circumstances, she would like to talk to her lawyer; he didn't recall that Mrs. Witt told him that she was willing to submit to a lie detector test (R. T. pp. 87-89). He stated that in the first conversation which he recorded Mrs. Witt denied having any knowledge that the package contained a drug (R. T. pp. 89, 90).

JOHN MAXCY testified he was present at the conversations involving the defendant to which Agent Gates had testified; that he received Government's Exhibit 1 from Mrs. Lohman (R. T. pp. 91, 92); that his answers would be the same if the questions put to Mr. Gates were put to him (R. T. pp. 91, 92)

On cross examination he stated that he was present at the first conversation with Mrs. Witt and during the conversation she said she had no knowledge there was any narcotic or contraband in the package (R. T. p. 93); Mrs. Witt was not asked about a lie detector test; he was present with Mr. Anderson when he was questioned; Anderson stated he was willing to take a lie detector test; said he was a Fireman in Los Angeles, that he had been for 10 or 12 years; that he was a friend of Mrs. Witt; that he had known Mrs. Witt for quite a few years; that he and she had gone down for a visit and had gone to the race track (R. T. pp. 93, 94); there was a recording device in operation at the first conversation, it was not transcribed; that Mrs. Witt said that she was a widow, had two children, worked at the County Hospital in Los Angeles; that the package had been given to her and that she had no knowledge that it contained narcotics (R. T. p. 95). The officer then stated she preferred not to give answers to questions other than her name, occupation, and the names and ages of her children; she had said she had gone over to the Jai Alai games.

"Q. And she told you that she had been given the package; isn't that

right?

"A. I believe she did, but I really don't remember that.

"Q. You wouldn't say that she didn't say that, would you?

"A. I wouldn't say she didn't say it, no." (R. T. pp. 95, 96).

He stated that a report was made by himself and Mr. Gates; that he dictated the report stated:

"Q. I will ask you if it does not state: 'There were present in the Customs Agency Service, San Diego (San Ysidro), California on December 26, 1959, for the purpose of interrogating Ruth Etta Witt and Charles Willard Anderson regarding a seizure of heroin found concealed on the person of Mrs. Witt. Also present during the interview was Customs Inspectress Annetta W. Lohman.'"

That appears in the report, does it not?

"A. She was present, yes, sir."
(R. T. p. 98).

He stated that all the report said about where the package was found is "regarding a seizure of heroin found concealed on the person of

Mrs. Witt." (R. T. p. 98). The witness examined the document and then said,

"That's correct, sir, 'found on the person'."

There was nothing said in the report about finding the package in the brassiere or in the coat (R. T. pp. 98, 99); that the report said Mrs. Lohman was present during the interview with Mrs. Witt, and she was present during the interview with Mrs. Witt, and she was present during the entire interview conducted with Mrs. Witt (R. T. pp. 100, 101).

Without waiving any rights to objections that might be made to the reception of Exhibit 1, it was stipulated between counsel for the Government and defendant-appellant that if Mr. Schneider, the chemist, was called and would testify concerning Exhibit 1 that he examined the contents and in his opinion it contained heroin (R. T. pp. 101-103).

It was then stipulated between counsel for the Government and the defendant-appellant that if Helen E. Grotefend were called she would testify she was a Seizure Clerk employed by the United States Customs Service at San Diego, that she would testify she received Government's Exhibit 1 from John Maxcy, Custom Agent, that she mailed it by registered mail to Albert H. Schneider, Chemist, employed by the United States Customs Service, Los Angeles; she then received the package from the Government chemist by registered mail, placed the same in her seizure locker

where it remained in her custody until it was brought into court (R. T. pp. 103, 104).

The exhibits were then offered, No. 2 being the stipulation regarding the expert opinion, then No. 3, the stipulation regarding the testimony of the seizure clerk.

Objections were then made to the effect that Exhibit 1 was obtained as a result of an unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and that it constituted a denial of due process of law. The Court stated he had read the report of the proceedings before Judge Carter, and that the judge stated he had heard further testimony that morning, and that the motion to suppress had been denied, that he was inclined to favor the ruling of Judge Carter, the transcript of the proceedings that morning were filed as Exhibit 4, it was not to go to the jury (R. T. pp. 105, 106).

The Government rested.

The defendant-appellant moved for a judgment of acquittal (R. T. pp. 107-109).

RUTH ETTA WITT testified she lived in Los Angeles; she was employed by the County of Los Angeles; she was a widow, had two children; she understood the nature of the proceedings; she did not knowingly bring any heroin across the border on December 26, 1959; that she was in Tijuana that day with Mr. Charles Anderson; they crossed the

border about 3 or 4 in the afternoon; they went to the race track; they were there 2 or 3 hours; Mr. Anderson was with her; they then went shopping in the downtown area, Mr. Anderson was with her; they went to the Jai Alai games; she was there about 30 minutes; she left Mr. Anderson at the Jai Alai games, she had some place to go, she had a previous appointment to meet Mr. Cruz Macias; she had known him 10 or 15 years (R. T. pp. 112-116). They were friends; she had some Christmas presents for him; she had brought them from Los Angeles; she met Mr. Macias; Mr. Anderson was not with her at the time she met Mr. Macias (R. T. pp. 116, 117). She testified she gave him the presents; Mr. Macias told her he wanted her to go with him to a friend's house; she had never been there before; she met a man there called Hill; Macias called him Hill; she had never seen him before (R. T. pp. 116, 117). They were there 25 or 30 minutes; while there Mr. Macias gave her a package, it was wrapped in white paper and asked her if she would do something for him; she said she would if she could; he asked her to take a package and give it to a man over across the border; she said, is it all right for me to give it to him, and Macias replied, yes; she then took the package; she did not at any time know it contained Heroin or any narcotics (R. T. pp. 117, 118). She put the package in her coat pocket; her coat was red; she kept the package in her coat pocket from the time Macias gave the package to her until she reached the border; she never put it in her brassiere (R. T. pp. 118, 119). She met Mr. Anderson after she had seen Cruz; she went

directly from Hill's house to the Jai Alai games where Mr. Anderson was; they left the Jai Alai games; they stopped, got some gasoline, then went to the border; they crossed the border (R. T. pp. 119, 120). They came to the border, a man asked them where they were born; she told him she was born in Mississippi and Mr. Anderson said he was born in Los Angeles; the man then asked Mr. Anderson for his driver's license, but before Mr. Anderson could get it, the man got in the car, pushed Mr. Anderson over and pushed her over, he then said for them to put their hands on the dashboard and not to move; they did this. The man drove the car over near the building (R. T. pp. 120, 121). Two other men were standing there, one man told them to get out of the car and they took them into the building. It was dark. She was taken into a room by Mrs. Lohman. Mrs. Lohman told her to take her clothes off; she asked Mrs. Lohman why did she have to do that, and Mrs. Lohman said, never mind, take them off, and said if you don't take them off I will have to take them off for you; she then took her clothes off (R. T. pp. 120-122). She did not have a package in her brassiere. When she started to take her clothes off she put her purse and coat on the desk that was in the room, and as she took them off she handed them to Mrs. Lohman; she took all of her clothes off; she didn't have a package in her brassiere (R. T. pp. 121, 122); that she had her back to the matron; the matron told her to stoop over for she wanted to examine her rectum; she stooped over and when she turned around the matron was feeling all over her back, pulling her skin

apart, and when she turned around the matron had this package in her hand; she did not see where she got it from; so far as she knows the package had always been in her coat from the time it was given to her by Mr. Macias (R. T. p. 122); she did not actually see where the matron took the package from; it had never been in her brassiere (R. T. pp. 122, 123). She testified that the matron examined her whole body, her mouth, her ears, under her arms, between her legs, her toes, the bottom of her feet; after she had been examined she was given back her clothes (R. T. pp. 123, 124).

She testified that she did not at any time tell the officers that she knew the package contained heroin; they wanted to know where she got the package and she told them it was given to her by a man; this had never happened to her before, and she didn't understand what was wrong; she was then asked whether she knew it contained heroin (R. T. pp. 124, 125); she replied that she did not; that she did not, in truth and in fact, know it contained heroin (R. T. pp. 125, 126); she did not at any time state to the officers that she was to get \$100 for making the trip; she did not at any time say she had been given money to pay for the narcotics; she did not at any time say she was to deliver the narcotics to a person known as Bo at Vernon and Central; she did not know any man by the name of Bo; she did not until after she had been arrested know that the package contained heroin (R. T. pp. 125, 126); she had never been arrested before and had no knowledge of narcotics (R. T. p. 126). She

testified that Mrs. Lohman was in the room when she testified and she did not know her testimony was being recorded; she stated she had worked at the Los Angeles County Hospital for eight years (R. T. pp. 127, 128); she had heard about narcotics in the hospital (R. T. pp. 127, 128); she stated that when Cruz Macias gave her the package she asked him if it was all right (R. T. p. 130); she knew she would have to go through the customs inspection when she crossed the border (R. T. p. 131); that Cruz Macias did not indicate what was in the package; she took it and put it in her pocket (R. T. p. 132).

The defense then rested, and the motion for judgment of acquittal was then renewed (R. T. p. 136).

The statement, Exhibit A, was received in evidence (R. T. p. 137).

QUESTIONS TO BE PRESENTED

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

II.

THE EVIDENCE WAS NOT SUFFICIENT.

III.

WHILE TITLE 26 U.S.C.A., SECTION 7237, SUBDIVISION D, PROHIBITING SUSPENSION OF SENTENCE FOR THE GRANTING OF PROBATION UPON CONVICTION OF DESIGNATED NARCOTICS OFFENSES AGAINST THE UNITED STATES APPEARS TO BE FAIR ON ITS FACE, ADMINISTRA-TIVELY IT IS APPLIED WITH AN EVIL EYE AND AN UNEQUAL HAND IN A MANNER FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN AN UNJUST DISCRIMINATION BETWEEN LIKE OFFENDERS AND THE PRIVILEGES AND PENALTIES OF LAW.

SPECIFICATIONS OF ERROR

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S
MOTION TO SUPPRESS.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence (Tr. of Rec. pp. 4-8). Evidence was offered to the effect that there was no search warrant, no warrant of arrest, and after the defendant-appellant crossed the border from a visit to Mexico, after perfunctory questions as to where she was born (the United States) the Customs Agent ordered her and her companion to move over, and the car was driven by the Agent to the side of the Customs Office. The defendant-appellant was there thoroughly searched by a matron, and in her brassiere the matron claimed she found a package. It was claimed the package was given to her in Mexico by a friend and that it was in her coat pocket. The only reason for stopping the car in which appellant was riding was the direction to the Customs Agent by a superior to be on the lookout for a car answering the description of the car occupied by appellant containing two colored women. The car contained the appellant and a colored man. The Court erred in denying the motion to suppress. The Court made Findings of Fact and Conclusions of Law (Tr. of

Rec. pp. 34-40). The Court erred in denying the motion to suppress - the search was invalid.

II.

THE EVIDENCE WAS NOT SUFFICIENT.

If the Court had granted the motion to suppress the use of the contraband obtained as a result of an unlawful search, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

The Court instructed the jury to the effect that there was possession in the appellant and such possession created a permissible inference of guilt.

Without the evidence of the contraband, and without such instruction, the evidence was not sufficient. The Court erred in denying our motion for judgment of acquittal (Tr. of Rec. p. 26). The motion was renewed and denied at the time of making the motion for new trial, and the Court denied the same (Tr. of Rec. p. 29).

III.

WE CONTEND THAT AT THE TIME
OF SENTENCE THE COURT HAD
THE INHERENT POWER TO SUSPEND
SENTENCE AND GRANT PROBATION.

A section was applied in a manner forbidden by the Due Process Clause of the Fifth Amendment. It amounted to an unjust discrimination between like offenders. If the prosecutor can elect to indict under a section which forbids probation, or may elect to file an information under a section which gives the court the power to grant probation, we say the application of the law amounts to a denial of due process.

At the time of pronouncement of judgment, appellant asked the Court to grant probation, the Court stated:

"However, the statute which is involved here, and under which you were charged and under which you have been convicted provides for a minimum sentence of five years, which is mandatory, so the court has no choice." (R. T. p. 196).

The Court further said:

"I have observed in the pre-sentence report that you have had no prior conviction, that you have been gainfully employed, you have been married, and you have two children, I think 4 and 19,

and that your husband died in 1955. "
(R. T. p. 196).

We contended, as stated at the time of judgment:

"I believe that the court does have the power, the inherent power to suspend sentence, and even though it might impose a minimum sentence, I urge that the court has the power and the constitutional right under the creation of this court to impose probation, subject to the restrictions as the court itself deems reasonable, and I urge upon you that you do so." (R. T. p. 198).

The motion for probation was denied (R. T. pp. 198-199).

SUMMARY OF ARGUMENT

1. It is our contention that the evidence was insufficient. The search was made in the absence of a warrant of arrest, in the absence of a search warrant, and there was no reasonable cause for the search. The appellant had been to Mexico, had been given a package, the contents of which she denied she had knowledge of, and after crossing the border the Customs Agent, because he had been alerted to be on the lookout for a certain car containing two colored women, forced the appellant against her will to submit to a most thorough search covering every portion of her anatomy.



2. The Court erred in denying the motion for judgment of acquittal. The evidence was not sufficient in the absence of a contraband unlawfully seized and in the absence of the instruction to the effect that the appellant would be required to satisfactorily explain possession of the contraband. There was not sufficient evidence.

3. It is our contention that Title 26, Section 7237, Subdivision (d) deprives the trial court of an inherent power to suspend sentence and grant probation, and in this case the section was applied in a manner forbidden by the Due Process Clause of the Fifth Amendment which amounted to an unjust discrimination between like offenders. In other words, it gives to the prosecutor the right to select a section of the code which has a minimum sentence and which denies to the trial court the right to grant probation. Its application is a denial of the Due Process Clause, for in some instances the prosecutor selects a section of the code for like offenders, for like offenses, which permits probation; in others he selects a section of the code, as in this case, which forbids the court granting probation. Such amounts to an unequal enforcement of the law and amounts to a denial of due process.

PERTINENT STATUTES

U. S. C. , Title 21, Section 174:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of the section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

ARGUMENT

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S
MOTION TO SUPPRESS.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence (Tr. of Rec. pp. 4-8). Said motion was supported by points and authorities. The hearing was held before the Court, at which time evidence was offered in support of the motion. The hearing was continued for the taking of further evidence. The motion to suppress was denied (Tr. of Rec. p. 16). The Court made findings of fact and conclusions of law (Tr. of Rec. pp. 34-40).

We have carefully reviewed the evidence in the statement of facts pertinent to the appeal, and will not here repeat it, in the interest of brevity.

Summarized, the evidence shows that Mrs. Witt, a widow, of Los Angeles, employed by the County of Los Angeles, at the General Hospital for some 8 years, had known her friend, Mr. Anderson, a Los Angeles Fireman, for some 10 or 12 years; they had gone to Tijuana, to the race track, the Jai Alai games; Mrs. Witt had gone downtown in Tijuana looking at the stores

and she met a man by the name of Cruz Macias whom she had known before and whom she had agreed to meet. Upon meeting Mr. Macias, he took her to another house where she met a man by the name of Hill. Macias asked Mrs. Witt to take a package for him and deliver it to a friend of his; she asked if that was all right and he replied it was; she says she put the package in her coat pocket; that she later met Mr. Anderson, they stopped for gasoline at a service station and then Mr. Anderson drove the car to the border and crossed the border. At the border the inspector asked them where they were born; Mr. Anderson answered in Los Angeles, Mrs. Witt in Mississippi; they were asked if they had brought any liquor or merchandise across the border, and they replied no; at this time the inspector at the Customs Office on the United States side of the border told Mrs. Witt and Mr. Anderson to put their hands on the dashboard of the car; he then told them to move over and he climbed in the car, drove it over to the side of the Customs House, and they were then taken into the Customs Office. Anderson was thoroughly searched after having been stripped; he was asked if he would submit to a lie detector test, and he said he would. He denied any knowledge of any narcotics; none were found on him or in the car. A matron was sent for, a Mrs. Lohman, who was a Customs Office Inspectress, and she took Mrs. Witt into a room and told Mrs. Witt to take off her clothes. Mrs. Witt stated she wanted to know why and she was told, in effect, that she had to take her clothes off or they would be taken off for her. After this statement to her by the Customs matron, Mrs.

Witt took her clothes off. The clothing was searched; Mrs. Witt's body was minutely examined, her mouth, her ears, her hair, her feet, her private parts; the matron looked in her rectum; felt her skin; examined her vagina; and after such examination stated to Mrs. Witt she had found a package in Mrs. Witt's brassiere. Mrs. Witt denied ever having the package in her brassiere, and said she had received it from Mr. Cruz and put it in her coat pocket, and that it had been there at all times. She did not see the matron take the package from her coat or elsewhere, but the matron testified that she had found it in the brassiere. Mrs. Witt denied it was ever there.

The only information the officers had concerning Mrs. Witt or this automobile was they had received information from a superior to stop and examine a car answering the description of the car in which Mrs. Witt was riding, and this information was to the effect there would be two colored women in the car. There were not two colored women in the car; it was occupied only by Mr. Anderson, the Los Angeles Fireman, and Mrs. Witt.

It is our contention that in the absence of a warrant of arrest, the absence of a search warrant, or in the absence to a search incident to a lawful arrest, the Court erred in denying the motion to suppress. There was no reasonable or lawful reason for this arrest. The inspector did not have before him anything which justifies this search.

A person aggrieved by an unlawful search

and seizure may move the Court for the return of the property and to suppress for use anything so obtained on the grounds that the property was illegally seized without a warrant. (Rule 41(e), Federal Rules of Criminal Procedure).

No search warrant having been obtained or having been used in this case, no warrant of arrest having been obtained or secured, and the search not being incident to a lawful arrest, it is our contention that the Court certainly erred in denying the motion to suppress. There was no lawful reason for this search. The officers did not have before them any information, any reasonable or probable cause for making the search; they had the bare statement of a superior to stop a car answering this description, it contained two colored women, and to make a search.

Mrs. Witt was never told she was under arrest until after the search had been made, and the record is barren of any information which justified the search.

As was said in Johnson v. United States, 68 S. Ct. 367, 333 U.S. 10, pages 13 and 14:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. "

It is our contention that the case of Blackford v. United States, 247 F.2d 745, decided by this Court in July, 1957, based upon the question of the legality of search and seizure by Government Agents at the border without warrant and, while from the facts of that case, it was held the search and seizure was legal and with reasonable and with probable cause, the law with reference thereto is clearly stated in Blackford v. United States, supra, 247 F.2d 745, 750:

"The Fourth Amendment provides that, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.' It makes no difference between persons and property. It does not value property over human anatomy, nor differentiate between them. The prohibition is broad and unqualified. All unreasonable searches and seizures are forbidden. (cases cited). It is true, as heretofore noted, that historically the Fourth Amendment was designed to curb the nefarious practice of arbitrary government invasion of private homes. But the Framers of our Constitution in their infinite wisdom did not produce so narrow a safeguard. The Amendment they enacted did more than simply provide protection against immediate threat. It provided a bulwark against unreasonable governmental searches and seizures conducted on persons as well as places. "

It should be borne in mind that this search was made without any warrant, without any reasonable or probable cause, and the case of Miller v. United States, 2 L. Ed. 1332, 1337, reverses the history of unlawful searches, particularly where no notice or sufficient warning of the intentions of the officer is given to the occupant of his home before they entered it. No notice of this search was given nor the reason therefor. Mrs. Witt was taken out of the car, taken into a room, and even the officer admits that Mrs. Witt did not consent to the search. Mrs. Witt was told in substance to "either take off her clothes or they would be taken off of her". Every inch of her anatomy was then thoroughly searched.

Throughout the United States the courts have become alerted to the failure of officers to obtain search warrants and the continuous unlawful arrest of people and search of their person, cards and premises has been condemned. Only recently, in the case of People v. Cahan, 44 Cal. 2d 434, the Supreme Court of California, reviewing the history of searches, and particularly in this State and throughout the country, reversed the rule concerning the admission of evidence obtained by search and seizure as a wrong which had been in force in California for almost half a century. As was said in People v. Cahan, supra, 44 Cal. 2d 434, 446, 282 P. 2d 905:

"It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state

seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty'. (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in Olmstead v. United States, 277 U. S.

438, 485 (48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376); see also State v. Owens, 302 Mo. 348, 377 (259 S. W. 100, 32 A. L. R. 383); Atz v. Andrews, 84 Fla. 43 (94 So. 329, 332); Youman v. Commonwealth, 189 Ky. 152 (224 S. W. 860, 866, 13 A. L. R. 1303); State v. Arregui, 44 Idaho 43 (254 P. 788, 792); State v. Gooder, 57 S. D. 619 (234 N. W. 610, 613).)

"If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be. (Rochin v. California, supra, 342 U. S. 165.) Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights. This peril has been recognized and dealt with when its challenge has been obvious; it cannot be forgotten when it strikes

further from the courtroom by invading the privacy of homes. "

The search of Mrs. Witt could only be justified if the searcher, the officer, had probable cause to believe that Mrs. Witt was carrying contraband or committing a crime. This means not only that the officers must have actually believed that Mrs. Witt was carrying contraband or committing a crime, but that there was a reasonable basis for that conclusion (Clay v. United States, 5th Cir. 1956, 239 F.2d 196, 202).

The only basis for this search, as we have said before was some information given by a superior to the officers in charge of the search to stop this car containing two colored women and search it. Where did the superior get the information? What was the source of it? There is nothing upon which to determine that there was any reasonable cause for this search.

The burden of showing probable cause is upon the Government.

Wrightson v. United States (D. C. Cir. 1955), 222 F.2d 556.

It has been said that when the only basis for the arrest is an informer's tip, this burden requires an affirmative showing of reasonable grounds for reliance.

United States v. Walker (7th Cir. 1957), 246 F.2d 519;

Contee v. United States (D. C. Cir.
1954), 215 F. 2d 324;

Draper v. United States (10th Cir.
1957), 248 F. 2d 295, affirming
(D. Colo. 1956), 146 F. Supp. 689.

In the instant case we had no information as to why a superior said to stop and search the car. Surely that is not enough.

Evidence acquired in violation of the Fourth Amendment prohibition against unreasonable searches and seizures is not admissible in Federal prosecutions. Concerning this there can be no question.

Weeks v. United States, 232 U. S. 383.

The Fourth Amendment contemplates judicial supervision of searches and seizures.

Henry v. United States, 4 L. Ed. 2d 134,
(U. S. S. Ct. Nov. 23, 1959).

In Henry v. United States, supra, the Supreme Court stated:

"The fact that the suspects were in an automobile is not enough."

Carroll v. United States, 267 U. S. 132, liberalized the rule governing searches when a moving vehicle is involved, but that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.

All the fruits of an illegal search are inadmissible.

Silverthorne Lbr. Co. v. United
States, 251 U.S. 385.

II

THE EVIDENCE WAS NOT SUFFICIENT

We have fully stated the evidence and, if this Court should order that the narcotics or contraband was obtained as a result of an unlawful search and seizure, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

We are not unmindful of the problems of the trier of fact and that of the Appellate Court, but in this case there was no substantial evidence that the defendant had guilty knowledge of the nature of the contraband. Her answers throughout were those of an innocent person and, with the exception of a statement given to the officer in the second conversation which was not recorded wherein it is alleged she made some admission of a damaging character, her entire conduct was that of an innocent person. It should be borne in mind that the presumption of innocence prevails and her guilt was not established beyond a reasonable doubt.

To sustain a conviction in a case such as this the Government offered, and the Court gave, the following instruction:

"Another statute has application to the offense charged here, and that is Section 174 of Title 21 of the United States Code, which provides as follows:

'Whenever on trial for violation of

this' . . . statute 'the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. '

The statute I have just read does not change the fundamental rule that a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Nor does it impose upon the defendant the burden of producing proof that the heroin was lawfully imported or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt by the evidence beyond a reasonable doubt. What the statute I referred to and just read a moment ago does do, however, is to create an inference in favor of the United States. Thus, if you should find from the evidence, beyond a reasonable doubt, that there was possession, as that term will be defined to you, on the part of the defendant of any of the heroin referred to in the indictment, such possession creates a permissible inference of guilt as charged in the indictment.

As against that inference there is the possible contrary inference

that the heroine was not imported contrary to law, or that the possession thereof was innocent."

It is our contention that such an instruction places upon the defendant a burden which he should not be subjected to. For instance, the instruction said: "Such possession creates a permissible inference of guilt as charged in the indictment." (The instruction just hereinabove referred to is found at pages 165 and 166 of the Reporter's Transcript.)

Title 21, Section 174, does not mean that an accused must take the witness stand and explain his possession of narcotics, and a trial court has a duty to make this clear. We raise this point in connection with the sufficiency of the evidence because we think it has a direct bearing here, for a defendant is placed in a position by reason of this instruction and rule that he must of necessity take the stand and explain possession, which places him on either horn of a dilemma; if he fails to take the stand and explain, then an inference of guilt is permissible, according to the instruction; if he takes the stand and explains, if it is not satisfactory to the jury, then he is in no better position than he was before, for the jury under this instruction may draw "a permissible inference of guilt."

The Fifth Amendment to the United States Constitution provides that no person . . . shall be compelled in any criminal case to be a witness against himself, and Congress has provided that a failure to testify cannot be used

even as a presumption against a defendant (Title 18, Section 3481; Bruno v. United States, [1939] 308 U.S. 287). For these reasons, Title 21, Section 174, can not be and has not been, so far as we know, interpreted as requiring the accused to take the stand on his own behalf.

The instructions of the District Court in this case suggest not that the jury may reasonably infer the additional necessary elements of the crime charged if an accused does not show their absence, but that the accused himself must explain to the jury his possession of contraband.

Moreover, a statutory presumption such as Title 21, Section 174, must be reasonable even though it is nothing more than a "rule of evidence." Tot v. United States [1943] 319 U.S. 463.

It is our contention that Title 21, Section 174, as applied in this case is unconstitutional for it would, as in this case, violate the rule of presumption of innocence and reasonable doubt.

It will be noted that the concluding sentence of Section 174, Title 21, contains this statement " . . . such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." This, we contend, is contrary and in violation of the Fifth Amendment to the Constitution of the United States, a violation of due process of law.

The Supreme Court has without exception held the Constitution the "supreme law of the land," and superior to acts of Congress of the United States repugnant to the Constitution, have without hesitation on the part of the United States Supreme Court been voided. As was said in the case of West Virginia State Board of Education v. Barnette, 319 U.S. 646, at 671:

"The very purpose of the Bill of Rights is to withdraw certain subjects from the vicissitude of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. "

In United States v. Butler, 297 U.S. 62, the Court held:

"The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. "

But for the evidence obtained as a result of the unlawful search and seizure, as we contend and this instruction hereinabove complained of involving Title 21, U.S.C., §174, wherein the burden is shifted to the defendant, it is our contention that the evidence is woefully weak

and not sufficient to sustain the conviction.

III

WHILE TITLE 26, U. S. C. A., §7237, SUBD. D, PROHIBITING SUSPENSION OF SENTENCE FOR THE GRANTING OF PROBATION UPON CONVICTION OF DESIGNATED NARCOTICS OFFENSES AGAINST THE UNITED STATES APPEARS TO BE FAIR ON ITS FACE, ADMINISTRATIVELY IT IS APPLIED WITH AN EVIL EYE AND AN UNEQUAL HAND IN A MANNER FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN AN UNJUST DISCRIMINATION BETWEEN LIKE OFFENDERS AND THE PRIVILEGES AND PENALTIES OF LAW.

Subdivision d, Title 26 U. S. C. A., §7237, here under attack, depriving the trial court of an inherent power to suspend sentence and grant probation, is as follows:

"No suspension of sentence; no probation, etc. -- Upon conviction (1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of §2 of the Narcotics Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended,

or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of Title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and the following), as amended, shall not apply. "

While aside from the inherent power of the trial court to suspend sentence for the imposition of judgment to grant probation, in the interest of justice in deserving cases there is an unjust discrimination between like offenders for violation of the narcotic laws of the United States, for administratively the laws are applied with an evil eye and an unequal hand in a manner forbidden by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

In Latham v. United States (C. A. Fla. 1958), 259 F. 2d 293, the Court there considered the question of excluding probation or parole for first term narcotic offenders and held it to be constitutional as against the claim that it deprived the judiciary of power to grant probation and parole in violation of doctrine of the separation of powers.

In order to make our point clear, the appellant takes the position that while the statute appears to be valid on its face, it is

administered by prosecuting officers of the Government with an evil eye and an unequal hand, for it was held in Gore v. United States, (D. C. 1957), 244 F. 2d 763, affirmed by the Supreme Court, 357 U. S. 386, holding that the purpose of this section is to provide mandatory minimum sentences and to permit increasing higher maximum sentences for repeated violations of the narcotic laws as a deterrent to criminals who engage in illegal drug traffic and to increase the penalties for illegal traffic of narcotics.

We recognize that prosecutors can and do make bargains with informers, and it has been held that the United States Attorney has power to nolle prosequi or dismiss a prosecution against an informer who testifies for the Government. (See Ex Parte Altman, 34 Fed. Supp. 106). This places an unfair power in the hands of the prosecutor who is charged with treating all persons alike. It would amount to a denial of due process of law, we contend, for offenders in like position, that is, offenders who have violated the same law, under the same circumstances, to be prosecuted differently at the whim or caprice of the United States Attorney.

The injustice of this, we think, can be established by recourse to the files of this very court. For instance, let us take the case of Marcella v. United States, No. 16910, now awaiting determination on appeal before this court. Marcella was convicted by a jury, sentenced to 40 years without privilege of probation or parole, while the three confessed

narcotic users and peddlers who appeared as witnesses against him were dealt with in an entirely different fashion. The Government witness Browning was not even charged with an offense, and it may be remembered that he was a witness in the case of Stein v. United States, No. 16309. This man is a confessed narcotic user and peddler. The other witnesses in the Marcella case who had pled guilty and who by their own testimony first approached Marcella and attempted to induce him to get narcotics for them, after pleading guilty, they were permitted to withdraw their plea, then the information was filed against them and they received probation.

Other cases could be brought to this court's attention to show the unfair enforcement of the law under these circumstances. Even the court has the power to use its own judgment and all defendants should be treated alike. If discretion is to be used, it should be the discretion inherent in the court and not in the prosecutor.

What was said in Yick Wo v. Hopkins, 118 U.S. 220, at 227, is particularly appropriate here:

"For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their

administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. "

CONCLUSION

WHEREFORE, it is respectfully urged that the Court reverse the judgment herein.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH ETTA WITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 17051

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH ETTA WITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty of illegal importation of narcotics in violation of Title 21, United States Code, Section 174. The violation occurred in San Diego County, State of California, and within the Southern Division of the Southern District of California. The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain this appeal and to review the judgment of the District Court under Section 1291 and 1294(1) of Title 28, United States Code.

II.

STATEMENT OF FACTS.

At approximately 9:00 P.M., December 26, 1959, a "lookout list" was posted at the Port of Entry, San Diego (San Ysidro), California, for the use and information of the Customs Inspectors on duty inspecting vehicular traffic entering the United States from Tijuana, Baja California, Mexico. This list included a description of an automobile by make, year, color, and California vehicle registration number. The list further indicated that one or two Negro women would be in the vehicle and that the Customs Inspectors at the border should search the vehicle and its occupants for narcotics. [Transcript of Record, p. 35.]

Fifteen minutes later, Customs Inspector Rudolph L. Dale stopped the described vehicle as it entered the United States through the Port of Entry. Appellant was a passenger therein; the driver was a male companion, Charles Anderson. Upon inquiry by Dale, appellant and her companion claimed United States citizenship and denied that they had any property to declare. [T. R. pp. 35-36.]

Inspector Dale's suspicion was aroused by his interview with the appellant and her companion in the light of the recently posted "lookout list". For the purpose of conducting a thorough search of the vehicle and its occupants for the presence of narcotic drugs, he moved the automobile to the secondary inspection area and had the occupants enter the Customs Agency Service office

in the Customs House at the Port of Entry for interrogation and search. [T. R. p. 36.]

Customs Inspectress Annetta W. Lohman was summoned to the office to supervise the search of the appellant in a private room. She requested the appellant to remove her clothes. Appellant inquired whether this was necessary and Mrs. Lohman replied that it was. Appellant proceeded to remove her clothing without any further recalcitrance. When Mrs. Lohman inspected the clothing which appellant had removed, she found that appellant had secreted in her brassiere three rubber condoms containing heroin. [T. R. p. 37.]

As a result of this discovery, Mrs. Lohman inspected appellant's person, but discovered no further contraband. [T. R. p. 38.] No physical force was employed at any time in conducting the personal search. [R. T. pp. 78 and 134.]

Inspector Dale conducted a similar search of Mr. Anderson's clothes and person in another search room. No contraband was found. Negative results also obtained from Inspector Dale's search of the automobile. [R. T. pp. 64-65.]

Following the discovery of the heroin secreted in appellant's brassiere, Customs Agents Walter A. Gates and John Maxcy questioned appellant concerning her trip to Mexico. Appellant denied knowing that the condoms contained heroin. [R. T. p. 93.] Thereafter they interrogated her companion, Mr. Anderson. [R. T. pp.

79-81.] He was asked if he would take a lie detector test and he replied that he would. [R. T. p. 89.] Appellant did not volunteer to submit to such a test. [R. T. p. 88.]

A second interview with appellant followed about forty-five minutes later. [R. T. p. 81.] On this occasion she told the Agents that she had been given the money to purchase the narcotics found in her brassiere by a man in Los Angeles known to her as "Bo". Pursuant to his instructions she had met a Mexican male in Tijuana on the night of December 26, 1959, delivered some money to him and received the narcotics. She was to deliver the contraband to Bo at the corner of Central and Vernon in Los Angeles for which she was to be paid \$100. [R. T. pp. 82, 87-88.]

At no time during the interviews with appellant on the evening in question did she state that the heroin had been carried by her in her coat pocket. [R. T. p. 97.]

Before crossing the border into the United States, appellant spent five minutes in a ladies' rest room in a service station on the Mexican side of the border. [R. T. pp. 135-136.]

Appellant had no objection to the instructions delivered by the District Court. [R. T. pp 141, 176.]

III.

**CONSTITUTIONAL, STATUTORY, AND
REGULATORY PROVISIONS IN-
VOLVED.**

The one count indictment was based upon Title 21, United States Code, Section 174, which provides in pertinent part as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . , contrary to law, . . . shall be imprisoned not less than 5 or more than 20 years. . . .

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

Title 19, United States Code, Section 482, provides as follows:

“Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wher-

ever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

Title 19, United States Code, Section 1581, provides in pertinent part as follows:

"(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under chapter 5 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

Title 19, United States Code, Section 1582, provides as follows:

“The Secretary of the Treasury may prescribe the regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.”

Title 19, Code of Federal Regulations, Part 23, Customs Regulation of 1943, provides in pertinent part as follows:

“§23.1 . . . (a) For the purpose of examining the manifest or inspecting and searching the vessel or vehicle, any customs officer [footnote omitted] at any time may go on board of:

“(1) Any vessel at any place in the United States [footnote omitted];

“(2) Any American vessel on the high seas when there is probable cause to believe such vessel is violating or has violated the laws of the United States; or

“(3) Any vessel within a customs-enforcement area, [footnote omitted] but customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign govern-

ment, or in the absence of a special arrangement with the foreign government concerned. * * *

“(d) A customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting and searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law. * * *.”

Amendment 4 to the Constitution of the United States of America provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

IV.

ARGUMENT.

- A. Appellant, a Suspected Narcotics Smuggler Entering the United States From Mexico, Was Lawfully Searched at the Port of Entry by an Authorized Female Inspectress of the Bureau of Customs, and the Commercial Quantity of Heroin Discovered in Her Brassiere Was Properly Seized and Subsequently Received in Evidence.

The gist of Appellant's theory on her motion to suppress the seized heroin is that an international traveler entering the United States through a Port of Entry supervised by the Bureau of Customs of the Treasury Department may not be searched for contraband unless the Customs Inspectors have probable cause to believe that the entrant is concealing contraband. This is not the law and has never been the law since the adoption of the Constitution. It has always been understood that the sovereign had plenary power to control the introduction of contraband across its borders from abroad and to insure its physical security and protect its revenue by a thorough search of all persons and chattels entering the country.

In the Act of July 31, 1789, the First Congress sitting in its first session saw fit to recognize these principles in the earliest federal legislation:

"Sec. 24. *And be it further enacted*, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to en-

ter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.”

1 Stat. 29 at p. 43 (1789).

It is significant that this first customs search and seizure statute, enacted 171 years ago, clearly distinguishes between searches of vessels and searches conducted generally within the nation. It is apparent, therefore, that the Congress which proposed the Fourth Amendment 54 days after the enactment of the foregoing statute recognized a warrant, secured from a justice of the peace upon an oath or affirmation setting out the officer's *cause to suspect*, was necessary to search inland for contraband which might have been smuggled into the country, but that no warrant was required for a search of a ship or vessel, which, presumably, would be at or beyond the borders of the United States.

1 Stat. 97 (1789) (the resolution which became the Fourth Amendment).

This case poses the rare instance of a fact situation the constitutional interpretation of which was authoritatively announced by the draftsmen of the very organic law in issue. Mr. Chief Justice Taft observed that:

“ . . . The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”

Carroll v. United States, 267 U. S. 132, 149 (1924).

Thus, the right to conduct searches at the border without a warrant was recognized by the very Congress whose resolution of September 23, 1789, gave birth to the Bill of Rights which, according to appellant, invalidates the search procedure authorized on July 31, 1789.

This distinction between the search of a conveyance or traveler for contraband and the inland search of a dwelling or other structure has been perpetuated by Congress from 1789 to this day. The present statute was enacted on July 18, 1866. Mere suspicion of contraband is sufficient under that statute to justify the search of a traveler entering the United States.

14 Stat. 178, 19 U. S. C. Sec. 482, R. S. Sec. 3061 (1866);

13 Stat. 441 (1865);

3 Stat. 315 (1816);

3 Stat. 231 (1815);

1 Stat. 627, 677 (1799);

1 Stat. 305, 315 (1793);

1 Stat. 145, 170 (1790).

Apparently, the 1815 enactment, *supra*, was the first extension of the border search principle beyond water craft to land conveyances, beasts of burden, and people. It is understandable that as land commerce with other nations on the North American continent developed, Congress saw the need to extend the search power of revenue enforcement officers to the newer modes of smuggling. That statute is the model for the present statute which authorizes the search of vehicles and persons for contraband.

What is particularly noteworthy in the 1815 enactment is the fact that Congress did not restrict the power to search persons and chattels entering the country to cases where probable cause obtained.

The power to search them was plenary if the officer merely *suspected* the presence of contraband. Reasonable cause only became necessary if merchandise was found as a result of the border search. Then, seizure of such merchandise was authorized if there were probable cause to believe that the merchandise found pursuant to the search had been imported without the payment of a duty for which it was liable or in some other unlawful manner. Probable cause was a prerequisite to the *seizure* of the merchandise, but not to the search at the border which caused its discovery.

We submit that the discovery at the Port of Entry of three rubber condoms in the brassiere of a woman who had just entered the United States from Tijuana, Mexico, and the further discovery that such condoms contained a white powder resembling heroin did constitute probable cause to conclude that appellant was in the process of smuggling narcotic drugs into the United States. This conclusion is reinforced by the prevalency

of narcotics smuggling from Mexico into the United States through the San Diego (San Ysidro) Port of Entry, the fact of which this Court has previously taken judicial notice.

Blackford v. United States, 247 F. 2d 745, 752 (9 Cir. 1957), cert. den. 356 U. S. 914;

Cf. Carroll v. United States, 267 U. S. 132, 159-160 (1924).

The 1815 statute which expressly treats the problem of the traveler and the land conveyance for the first time clearly expressed the dichotomy between people and chattels in transit and other subjects of a customs search:

“ . . . And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced into the United States contrary to law, are concealed in any particular dwelling-house, store, or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant, directed to such officer, who is hereby authorized to serve the same, to enter such house, store, or other building, in the day time only, and there to search and examine whether there are any goods, wares, or merchandise, which are subject to duty, or have been unlawfully imported; and if, on such search or examination, any such goods, wares, or merchandise, shall be found, which there shall be probable cause for the officer making such search or examination, to believe are subject to duty, or have been unlawfully introduced into the United States, he shall seize and secure the same for trial; *Provided*

always, That the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals or carried by man on foot.”

3 Stat. 231, 232 (1815).

The distinction expressed in this 1815 statute cannot be questioned as an unreasonable legislative solution to the problem of protecting the economy and external revenue of the United States while aiding in the physical security of the nation. If it was a reasonable enactment at the close of the War of 1812, it is more clearly proper today after two world wars when millions of persons each year travel to and fro over the borders of the United States to all parts of the world. So well settled is the prerogative of a nation to require full disclosure of all merchandise and articles imported by a traveler at its borders that our research fails to uncover a single federal case in which a traveler has contended as this appellant that a personal search *at the border* may be made only by inspectors having probable cause to conclude that the traveler is a smuggler. In the recent cases concerning the border search, the right to search has been conceded and issue is taken with the reasonableness of the *extent* of the search after the presence of contraband in the traveler is discovered, or with the geographic scope of the border search power.

Murgia v. United States, No. 16811, 9 Cir. (Presently before this Court). (Customs arrest beyond the property of the Customs House);

Blackford v. United States, 247 F. 2d 745 (9 Cir. 1957), cert. den. 356 U. S. 914, (Search at the Port of Entry; probable cause conceded);

King v. United States, 258 F. 2d 754 (5 Cir. 1958), cert. den. 359 U. S. 939 (Search at the Port of Entry; probable cause conceded);

United States v. Yee Ngee How, 105 F. Supp. 517 (N. D. Cal. 1952) (Second search of ship's crewman on the pier held reasonable).

The customs power to search for contraband at the border without probable cause has been upheld even in a case where a vessel was merely sailing in a coastal bay with no evidence of international entry.

"... A search of a vessel by officers of the Coast Guard or of the customs for the purpose of discovering a cargo which might be subject to duty should not be regarded as unreasonable even though the search, as distinguished from the seizure, is made without probable cause . . ."

The Atlantic, 68 F. 2d 8, 10 (2 Cir. 1933).

Even the otherwise privileged mails do not escape the scrutiny of the customs inspector:

"... The revenue laws of the United States require that every owner or consignee of property imported from other countries shall report the same to the customs officers before it is landed from the vessel, and shall furnish an invoice of its character and purchase price, for valuation, or that it may be seen if it is duty free, and all the vexations and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by

law to prevent the smallest evasion of this principle.

“Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels **in hand** contain nothing liable to duty, or if they do, to state what it is, *and even the person may be subjected to a rigid examination*, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.”

Cotzhausen v. Nazro, 107 U. S. 215, 218 (188). (Emphasis added.)

In the foregoing holding the Supreme Court indicated that it was the view of the 1882 Court that the personal search at the customs house was an accepted practice in the enforcement of the customs laws.

Elsewhere the Supreme Court has recognized the distinction between the plenary power to search at the border and the more circumscribed search power under all other circumstances, the distinction completely ignored by appellant's brief:

“. . . The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things

differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. . . ."

Boyd v. United States, 116 U. S. 616, 623 (1885).

In a similar vein are the observations by Mr. Chief Justice Taft thirty-nine years later in the *Carroll* case, *supra*. He was called upon to determine the degree of probable cause necessary to authorize prohibition agents to stop and search an automobile within the United States. He considered the customs power to search at the border so clearly settled that he used it as a polar standard against which to test the case before him:

"... It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the

highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . .”

Carroll v. United States, supra, at pages 153-154.

Appellant misreads the significance of the *Blackford* case *supra*. She quotes a portion of that decision at page 34 of her *Opening Brief* and implies without explanation that her position is supported thereby. That quotation, taken in the light of the foregoing cases, demonstrates that appellant's position is wholly without merit. This Court observed in that passage that the Fourth Amendment made no distinction between the protection of property and the protection of persons: Both were constitutionally protected from unreasonable search and seizure. It would appear to be a corollary of that proposition that the Fourth Amendment affords no greater protection to appellant when she smuggles heroin in her brassiere than when she surreptitiously imports it in her handbag.

The heart of the matter is that appellant voluntarily subjected herself to the vexation of the search which was her undoing by traveling to Mexico. She was not rudely awakened in her home in the dark of night by

the secret police; she was aware that her belongings might be searched upon re-entry. She left the United States and, by her conduct while in Mexico and as she re-entered the country, she raised a suspicion in the mind of the customs inspector that she was smuggling contraband into the United States. Unlike *Blackford, supra*, no attempt was made to remove any contraband from the interior of her body, since she had secreted the heroin in her clothing. Nor was any emetic given to her, since she had swallowed no contraband as *King, supra*. She does not even assert that any force was used at any time during the search. She removed her own clothing. Her sense of shame should not have been unduly aroused by the female inspector specially employed to supervise the search of suspected female smugglers. Appellant cites not one authority which even suggests that such conduct by the Bureau of Customs is unlawful, no less in contravention of the Fourth Amendment.

The pertinent law was well summarized several years ago by Judge Oliver Carter as follows:

"If a search is valid there is nothing in the Fourth Amendment which inhibits the seizure by law enforcement agents of property, the possession of which is a crime, even though the officers are not aware that such property is on the person when the search is initiated . . ."

* * *

"Searches of persons coming into the United States from a foreign country are in a specialized category, readily distinguishable from such searches generally . . ."

* * * * *

“Neither a warrant nor an arrest is needed to search in these circumstances; and the search which customs officials are authorized to conduct upon entry is of the broadest possible character . . . That all persons entering the United States from outside might be searched without the necessity of probable cause was recognized in *Carroll v. United States*, *supra* . . .”

United States v. Yee Ngee How, *supra*, at pp. 519-520;

Cf. Bolger v. United States, D. C. S. D. N. Y. Nov. 16, 1960, per Frederick V. P. Bryan, J.

The significance of appellant's contention should be clearly recognized. Her contention is that without probable cause no persons can be searched by the Bureau of Customs when they enter the United States from abroad. If she were to persuade this Court of such a novel doctrine, the United States would at once be rendered helpless to protect itself from narcotics importers, smugglers of the entire spectrum of mercantile contraband, and saboteurs. Only in that rare case where customs agents or an informant had obtained probable cause in a foreign country in advance of the traveler's entry into the United States could a search be made. Appellant advances no distinction between the clothing on the traveler and the belongings in his valise; thus, no search whatsoever could be made under her theory except in that rare case of advance information. No longer would there be a need for the trained customs inspector experienced in observing the self conscious gesture evidencing the nervous smuggler, since his professional intuition would not authorize the search practiced by such inspectors since the inception of the Bill of Rights. Such

consequences should not be lightly risked even aside from the presumption of validity of long-standing legislation claimed to be repugnant to the Constitution. However, appellant's theory is even more ambitious. She is attempting to invalidate not merely 171 years of legislation, she is attacking the propriety of the actual day-to-day practices of customs inspectors who have been following these heretofore unchallenged laws throughout the existence of this country.

Our research has uncovered the regulations prescribed by the Secretary of the Treasury pursuant to the customs laws for the guidance of the customs inspectors as far back as 1874. In that year the Secretary of the Treasury issued a volume of regulations for the use of the customs inspectors so that they would know their duties under the customs laws as well as the policy of the Treasury Department concerning their application. Articles 838 and 839 restated the search and arrest powers conferred upon officers of customs by statute.

General Regulations Under the Customs and Navigation Laws of the United States (Wash., Gov't Printing Office, 1874).

The Secretary recognized the unusual powers contemplated by the customs and navigation laws and saw fit formally to caution his inspectors that a policy of restraint must be followed in their duties:

“Art. 841. The severity and extent of the provisions for the seizure and examination of books, papers, and accounts, are such that extreme caution, discretion, and forbearance are requisite in their enforcement and exercise. They are not to be put in operation upon hasty or trivial charges nor ever used in full force, except when absolutely

necessary in extreme cases. Officers are cautioned that such extensive powers are to be strictly construed; that an exact observance of every form of law, to the most minute particular, is indispensable, and that the arbitrary and unnecessary use of these powers is strictly forbidden, and may subject the offender to an action at common law for damages sustained by the aggrieved party."

Thus, at least 86 years ago the enforcement agency had recognized the breadth of its search and seizure power, that the powers surpassed those of other law enforcement officers and should be exercised sparingly and with tact. The continued adherence to this conservative attitude probably explains the dearth of cases alleging unreasonable search of persons entering the United States.

In 1884 regulations identical to the foregoing were published by the Secretary. In 1892 the regulations expanded upon the problem of inconvenience to the traveler as follows:

"Art. 353 . . .g. The examination of passengers' baggage at the wharves entails unavoidable inconvenience and discomfort to the passengers. Officers employed upon this service must observe strict courtesy and decorum in their proceedings. . . . Customs officers assigned to baggage examinations will be held amenable to discipline for any violation of these rules."

**Customs Regulations of the United States Prescribed for
the Instruction and Guidance of Officers of Customs
(Wash., Gov't Printing Office, 1892).**

That all articles were subject to search upon entry is not left in doubt by the 1892 Regulations since they contemplated a general search of all incoming belongings:

“Art. 355. At the larger ports, customs officers will be detailed to furnish to passengers the necessary blanks and instruct them in regard to declaring the contents of their packages. Inspectors duly designated will verify such declarations by an examination of the baggage as soon as landed, and dutiable articles found therein must be submitted by them to the appraiser, or officer acting as such, for appraisement, and duty found due thereon shall be assessed and collected by the collector and the articles delivered to their owner. No baggage shall be examined until the passenger has made the declaration required by law, nor can such declaration be amended or changed. Should such duties not be paid, the dutiable merchandise will be treated as unclaimed. No seizure shall be made in the absence of clear evidence of fraudulent intent. Baggage shall be examined on the deck or wharf, and not in a cabin or state-room.”

* * *

“Art. 357. The examination of passengers' baggage by the officers assigned to that duty must be strictly enforced, but care must be taken that the scrutiny be conducted with decency and proprie-

ty. Any examining officer guilty of intentional rudeness or disrespect toward a passenger must be reported to the collector for discipline.”

* * *

“Art. 360. All baggage of passengers from contiguous foreign territory shall be examined by an inspector at the port of first arrival, and, if dutiable goods are found contained therein, the amount of duties shall be assessed and collected. If a passenger refuses to open the trunks or other envelopes containing his baggage, or to deliver the keys, the inspector shall open the baggage, and, if dutiable articles are found therein, the trunks or envelopes, with their contents, shall be forfeited.”

* * *

“Art. 1063. Inspectors on the frontier will exercise diligence to prevent smuggling in or by boats, carriages, or by persons arriving from adjacent foreign territory; they will not permit boats or vehicles to avoid the required report and inspection at the nearest customs stations within the United States.
. . .”

The 1892 Regulations allude to the problem of searching female travelers:

“Art. 1067. Upon the arrival of a steamship from a foreign port, notice will be sent to the female inspectors to attend at the place where the baggage of the passengers of the steamer is to be landed, and upon receiving such notice they will report without delay to the deputy surveyor, or the officer of the vessel, and there remain until relieved from further attendance. They are required

to keep themselves informed of the time when steamers are expected, so that upon receipt of notice thereof they may be ready to report for duty in proper time. All merchandise, or articles subject to duty which are seized by them, must be sent to the seizure room, and reports made thereof."

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Officers of Customs (Wash., Gov't Printing Office, 1892).

The 1900 Regulations republished the substance of the foregoing 1892 Regulations in Arts. 585, 588, 592 and 1632. In the 1908 Regulations the full statutory power to search travelers on the basis of the suspicion of concealing contraband was spelled out by the Secretary as follows:

"Art. 1423 . . .

"(Customs officers) . . . are authorized to stop, search, and examine any vehicle, beast, or person on which or whom they may suspect there is merchandise unlawfully introduced into the United States. If such goods are found, they will seize the vehicle, beast, and all packages, arrest the person or persons, and report the facts to the collector.

"They are authorized, if necessary, to enter upon or pass through the lands, inclosures, or buildings other than the dwelling house of any person, at all times, either night or day."

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1908).

With the arrival of World War I, the 1915 Regulations were less covertly worded than the regulations of the Victorian era concerning the function of female in-

spectresses, the existence of whom had been recognized in the 1892 Regulations:

“Art. 1088. Inspectresses.—Female inspectors are employed for the examination and search of persons of their own sex arriving from foreign countries, and upon the arrival of a steamship from a foreign port notice will be sent to such female inspectors to attend at the place where the baggage of the passengers is to be landed, and they will report without delay to the deputy surveyors or the officer in charge of the vessel, and there remain until relieved from further attendance.”

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1915).

The 1924 Regulations continued in similar form the growing literature of search procedure. By 1932, the Secretary of the Treasury determined that the following brief regulation was sufficient to treat the day-to-day practice of searching suspected female smugglers entering the United States:

“Art. 1338. Inspectresses.—Female inspectors are employed for the examination and search of persons of their own sex arriving from foreign countries.”

Customs Regulations of the United States Prescribed for the Instruction and Guidance of Customs Officers (Wash., Gov't Printing Office, 1932).

In 1937 the Secretary issued a new set of regulations which substantially restated the foregoing regulations. The present regulations of the Bureau of Customs, which are published in Title 19 of the Code of Federal Regulations, are the Customs Regulations of 1943.

The foregoing canvass of customs regulations since 1874 has been presented so that the Court may consider not merely the reasonableness of the customs search statutes but also the reasonableness of the administrative interpretation given to these laws by the agency charged with their enforcement since 1789. While we submit that the Government could properly insist that every traveler, or every tenth traveler, entering the United States submit to a search of his person as well as a search of his baggage, it has not been the practice of the Bureau of Customs to engage in such intensive search procedures, partly because of the public annoyance which this practice would produce and partly because of the prohibitive cost which it would entail. Instead the regulations promulgated pursuant to statute and the training manual published by the Secretary of the Treasury have consistently followed a restrained view of the search power, requiring *grave suspicion* before extending the search of a traveler's baggage to a search of the traveler's person:

"Sec. 193. Instructions Generally.—Inspectors shall closely scrutinize the person and observe the actions of all passengers. When there is suspicion that an attempt is being made to violate the customs or immigration laws, a report shall be made immediately to the officer in charge.

"A passenger shall not be subjected to a personal search except when there is grave suspicion, and not until all the facts have been submitted by the inspector to the officer in charge for his approval of the proposed action. When a personal search is ordered, another inspector, if available, shall be designated to assist. Arrangements may be made with

the purser of the vessel to assign a room for the purpose. The passenger shall be instructed to remove his clothing, one piece at a time. Each piece shall be thoroughly searched and the contents placed on a table in full view of the passenger. All bills, price tags, and other pertinent articles shall be segregated and detained. At the conclusion of the search, the inspector shall notify the officer in charge of the results and shall be guided by his decision. If articles are retained by the inspector for further action they shall be marked for identification in the presence of the passenger. The declaration shall be endorsed to show the action taken."

Manual for the Guidance of Customs Inspectors, Treasury Department, Bureau of Customs (Wash., Gov't Printing Office, 1946).

We cannot stress too vigorously the importance of the issue raised so blithely without reason or authority by appellant. If she should prevail, no simple revision of administrative regulations could reestablish the border security of the nation. It is the constitutional validity of the ancient customs search statutes which are brought in issue by this appeal. Thus, only by amending the Fourth Amendment to the Constitution to recognize *expressly* the border search power of the Bureau of Customs, *implicitly* recognized therein since 1789, could we cure the injury to the physical security and revenue of the United States that would result from a reversal of the judgment below by this Court.

Indeed the unreasonableness of appellant's position becomes patent when the facts of her narcotics smuggling are considered in the light of her legal contention. Judge

James M. Carter, below, described the situation quite forcefully as follows:

“The Court: If we had no way of controlling this border, how could you stop the flow of narcotics into this country? If what you say were the law, we might as well discharge the Customs officers and say, ‘Go to it boys, you can bring narcotics across the border because the Customs Officers can’t search your person as long as you have a clean collar on and don’t stutter when asked what your citizenship is, as long as there is no informer. Bring it across and let’s have a nice game of hide-and-seek after you bring it into the country to try to find it.’ I can’t conceive that that is the law. I can’t conceive that a country doesn’t have the right to protect itself from violations occurring at the border. This would go to the internal security of the country. Today we talk about heroin. Tomorrow you can talk about the spy, about the espionage agent, the man bringing secret messages across. Has this country no power to protect itself? This startles me.” [R. T. pp. 28-29.]

The distinguishing factor between the cases cited by appellant and the instant one is that they do not concern a search at the border, with the single exception of the *Blackford* case, *supra*; that case concerns not the power to search without probable cause, but the *extent* of a personal search into the interior of the body, the existence of probable cause to search being virtually conceded.

The *Johnson* case concerned a search of a dwelling conducted by the Federal Bureau of Narcotics and the

Seattle Police Department without a warrant. No border search question was involved.

Johnson v. United States, 333 U. S. 10, 13-14 (1948).

The *Miller* case concerned a search of a dwelling conducted by the Federal Bureau of Narcotics and the District of Columbia Police Department without a warrant. No border search question was involved.

Miller v. United States, 357 U. S. 301 (1958).

The *Clay* case was an arrest and search conducted by Intelligence Agents of the Internal Revenue Service investigating evasion of the Federal Wagering Tax. No border search question was involved.

Clay v. United States, 239 F. 2d 196 (5 Cir. 1956).

The *Wrightson* case was a search of a dwelling incident to the arrest of an armed robber by the District of Columbia Police Department. No border search question was involved.

Wrightson v. United States, 222 F. 2d 556 (D. C. Cir. 1955).

The *Walker* case concerned the arrest of a narcotics peddler based upon an informant's tip corroborated by police records. No border search question was involved.

United States v. Walker, 246 F. 2d 519 (7 Cir. 1957).

The *Contee* case was a search of the defendant's dwelling without a warrant pursuant to the investigation of an armed robbery by the District of Columbia Police Department. No border search question was involved.

Contee v. United States, 215 F. 2d 324 (D. C. Cir. 1954).

The *Draper* case was an arrest of a narcotics peddler by the Federal Bureau of Narcotics based upon probable cause. No border search question was involved in the arrest which occurred in the Denver Union Station.

Draper v. United States, 358 U. S. 307, (1959),
Affirming 248 F. 2d 295 (10 Cir. 1957), af-
firming 146 F. Supp. 689 (D. Colo. 1956).

Finally, appellant's citation of the recent *Henry* case lends no support to her position, since that case concerned an arrest and search of an automobile by the Federal Bureau of Investigation in Chicago, Illinois, during the investigation of a case concerning the theft of property stolen from interstate commerce. No border search question was involved.

Henry v. United States, 361 U. S. 98 (1959).

Although this case appears to be the first one in which this Court has been called upon to determine whether probable cause is necessary for a border search, its opinion in the first *Cervantes* case indicated by way of clear dictum how this case should be decided:

"An authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. 19 U. S. C. §482. *Carroll v. United States* . . . But after entry has been completed a search and seizure can be made only on a showing of probable cause. *Landau v. United States*, 2 Cir., 82 F. 2d 285, 286; *United States v. Yee Ngee How*, D. C., 105 F. Supp. 517, 523 . . ."

Cervantes v. United States, 263 F. 2d 800, at
footnote 5, p. 803 (9 Cir. 1959).

In the *Landau* case, *supra*, the Second Circuit observed:

“As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary . . . [citing *Carroll v. United States*, *supra*]. Neither a warrant nor an arrest is needed to authorize a search in these circumstances. In the instant case, there was no disturbance of the appellant, his residence, or his effects after a completed entry. It was to these evils that the Fourth Amendment was directed . . . [citing *Boyd v. United States*, *supra*]. It has been said: ‘Whatever the causistry of border cases, it is broadly a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.’ See *United States v. Kirschenblatt*, 16 F. 2d 202, 203 . . . (C. C. A. 2) . . .”

Landau v. United States Attorney, 82 F. 2d 285, 286 (2 Cir. 1936), cert. den. 298 U. S. 665.

We further submit that in deciding the *Blackford* case, *supra*, this Court was necessarily concluding that the search procedure followed in this case was proper. It would appear from the opinion in that case that the Court was of the view that probable cause to search Blackford’s rectum did not obtain until after he was disrobed and the inspector discerned the greasy foreign substance in the vicinity of his rectum. The Court held:

“ . . . The customs officer did not exceed his authority in detaining appellant nor by asking him to remove his coat . . . ”

Blackford v. United States, supra, at page 749.

At this point, the customs officer was acting upon uncorroborated suspicion.

When Blackford's coat was removed his bare arms revealed the tell-tale needle marks of a narcotics addict. When appellant's brassiere was removed her cache of heroin was revealed. Once the condoms of heroin were discovered by the Customs Inspectress, it cannot be doubted that she had probable cause to believe that appellant was smuggling an illegal substance into the United States from Mexico. Thus her seizure of that evidence was clearly valid. Does the validity of the search which uncovered this evidence turn on the fact that it was secreted in an undergarment rather than, as with Blackford, hidden merely by the sleeve of his coat? Such a distinction would be whimsical.

Appellant chose to secrete heroin in her clothing immediately before she entered the country. She was given an opportunity to avoid commission of the crime of narcotics smuggling when she was asked by the Customs Inspector at the border if she had anything to declare. She rejected that opportunity. She has no complaint now that the Bureau of Customs officials performed their duty with dignity and decorum and frustrated her clandestine activities. The search of her clothing was a proper exercise of the historic, and heretofore unchallenged, border search power and the seized heroin was properly admitted into evidence at the trial.

B. The Evidence of Guilt Was More Than Sufficient to Justify the Conviction.

It would be hard to conceive of a smuggling case with more conclusive evidence of guilt, absent a judicial confession by the appellant under cross-examination. Disregarding for the moment the rule that on appeal the evidence should be considered in the light most favorable to the Government, even *appellant's* version of the facts is not consistent with her plea of not guilty.

Ignoring the fact that the heroin was found in appellant's brassiere by the Customs Inspectress, appellant contends that she was an innocent traveler transporting across the international border in her coat pocket a soft packet wrapped in a napkin, as an accommodation to a Mexican friend. Her story is that she expected to carry the packet just a few blocks, from one side of the border to the other and to deliver it to a man she did not know. She had no cogent explanation for not suspecting that contraband was in the packet. She assumed that her Mexican friend could not legally cross the border and deliver the packet himself. [R. T. pp. 129-135.]

However, the jury verdict indicates that the appellant's incredible explanation of her delivery service was not accepted by the trier of fact. The very location of the contraband on her person indicates that appellant had guilty knowledge that she was importing contraband. Just before crossing the border, appellant admitted, she stopped in the ladies' rest room of a service station in Mexico. The jury might well have inferred that she took this opportunity to secrete the three condoms of heroin in her brassiere in order to avoid detection at the Customs House. She denied having anything to declare when stopped by the Customs Inspector at the bor-

der. After the heroin had been discovered in her brassiere, appellant admitted that she was to receive \$100 for delivering the contraband to "Bo" at Vernon and Central Avenues in Los Angeles.

It thus appears that the Government required no rebuttable presumption of guilty knowledge to establish criminal intent. In any event, appellant made no objection to any of the jury instructions. So far as this case is concerned, had she made a timely objection, the district court might well have determined that the facts did not require a reading of the statutory presumption complained of by appellant, since the circumstantial evidence of criminal intent was so clear.

C. No Constitutional Right of Appellant Was Violated by the Failure of the District Court to Impose a Term of Probation Upon Her Rather Than Five Years in the Custody of the Attorney General.

Appellant's final point is utterly frivolous. She does not contend that the term of her commitment, the minimum provided by law, was illegal. Nor does she assert that the law under which she was sentenced was invalid. Yet she contends that *something* is illegal. It is not clear to us exactly where the illegality or inequity of which she complains can be found. There were no co-defendants in this case as in *Marcella v. United States*, No. 16910, which she cites. Thus, no decision on comparative culpability had to be made by the Government with respect to this case. There was only one count in the Indictment and only one defendant. The jury found her guilty of narcotics smuggling on overwhelming evidence.

Certainly the foregoing facts are not apposite to those of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), upon which appellant relies. That case was a challenge under the equal protection clause of the Fourteenth Amendment to the systematic discrimination against Orientals in the administration of a San Francisco municipal ordinance concerning the operation of laundries. Here we are concerned with the sentencing of a person properly convicted of a federal crime. Nothing appears in the record of this case, nor can this Court take judicial notice of any facts suggesting that an "evil eye" or an "unequal hand" have been employed by the Government in the enforcement of the federal narcotics laws.

Saunders v. Lowry, 58 F. 2d 159 (5 Cir. 1932).

However, the question of the availability of probation after conviction under 21 U. S. C. Sec. 174 can be of only academic interest to appellant, since the record does not indicate that the District Court was of a mind to grant probation to her assuming, *arguendo*, it had the power to do so. Quite the contrary, the sentencing judge seems to have been of the opinion that the commercial quantity of heroin smuggled by appellant justified a term of commitment:

"The Court: I have considered what you suggest in other cases, some of which I think have been more compelling than this, as far as my compassion on the particular defendant is concerned, but I have concluded that while there may be some question as to the validity of the law, I am inclined to believe that Congress does have the power, and more particularly, I believe that the court should be extremely cautious in attempting to amend laws by judicial decree, when the proper body to enact laws and to

make amendments of the statute, if any should be made, is the Congress. Therefore, the court would not attempt to place this defendant on probation in view of the statute in its present terms." [R. T. pp. 198-199.]

We submit that a legal sentence was imposed upon appellant and she cannot complain that the district court did not impose upon her a sentence, which even by her theory is discretionary with the court, and which the district court indicated it was not disposed to impose in any event.

Brown v. United States, 222 F. 2d 293, 298 (9 Cir. 1955).

V.

Conclusion.

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted,

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United States of America.*

No. ~~17052~~

17053

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FRANK H. SCHMID, CL

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No. 17503

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On October 15, 1958, appellant was charged by the grand jury in a 22 count indictment under the provisions of Section 287 and 495 of Title 18 United States Code. [C. T. 15-36.]¹

On December 5, 1958, appellant represented by counsel was convicted after a jury trial on 21 counts of this 22 count indictment.² [C. T. 10, 37.]

On December 5, 1958, appellant was sentenced to a total of twenty-eight years imprisonment. [C. T. 37.]

¹C. T. whenever used in this brief refers to the Clerk's Transcript.

²Count 1 of the indictment was dismissed by the court because of a jury error in returning the verdict.

The jurisdiction of the United States District Court to entertain the action was founded upon Section 3231, Title 18, United States Code.

Appellant represented by counsel appealed from the judgment of conviction. The Circuit Court of Appeals for the Ninth Circuit affirmed appellant's conviction in 271 F. 2d 791. (Ninth Circuit 1959.)

On June 1, 1960, the Honorable Judge Ernest A. Tolin denied petitioner's motion brought under Section 2255 of Title 28 United States Code to vacate judgment and correct sentence on the 8 counts of the indictment charging offenses within the Northern Division of the Southern District of California. [C. T. 10-14.]

This is an appeal from Judge Tolin's order denying appellant's motion to vacate sentence and judgment. [C. T. 10-14, 38.] Jurisdiction of the court of appeals to entertain this matter rests pursuant to Title 28 United States Code Sections 1291, 1294 and 2255.

II.

Statement of Case.

On December 5, 1958, appellant was convicted on a total of 21 counts of a 22 count indictment after a trial before the United States District Court for the Southern District of California, Central Division, the Honorable Ernest A. Tolin presiding. [C. T. 37.] Fourteen counts of the indictment charge offenses occurring within the Central Division of the Southern District of California,³ while the remaining 8 counts charge unlawful activities occurring within the North-

³Counts 1, 4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 22.

ern Division of the Southern District of California.⁴ [C. T. 15-36.] A reading of the indictment and the record in this case indicates that the activities specified in all 22 counts of this indictment were part of a common plan or design formulated by the appellant.

Appellant's present motion under Section 2255 of Title 28 United States Code attacks the validity of the judgment on only those 8 counts of the indictment charging offenses committed within the Northern Division of the Southern District of California. These counts effect nine years of appellant's total sentence of 28 years imprisonment.⁵ [C. T. 37.] The remaining 19 years of the appellant's sentence are not questioned on this appeal.

Appellant's present objection as to venue was not raised during the District Court proceedings and was not even alluded to when appellant appealed from his District Court conviction. Different counsel represented appellant at the trial and appellate levels of this case.

III.

Question of Law Involved.

Does the appellant, represented by counsel, waive any objection as to venue when he fails to object either at trial or during his subsequent appeal to being tried in one particular division of a district rather than another.

⁴Counts 2, 3, 7, 8, 12, 13, 20 and 21.

⁵Judge Tolin ruled that the sentences should run consecutively on the following counts alleging offenses occurring within the Central Division of the Southern District of California. Count 4, 1 year; count 5, 1 year; count 6, 5 years; count 9, 1 year; count 10, 1 year; count 11, 1 year; count 14, 1 year; count 15, 1 year; count 16, 5 years; count 19, 1 year and count 22, 1 year. The total sentence imposed for these counts is 19 years.

IV. ARGUMENT.

A. Venue Is a Procedural Matter and May Be Waived.

The constitution of the United States grants the accused the right to a trial in the state and district in which his offense was committed,⁶ and the Federal Rules of Criminal Procedure authorize trial in the division of the district where the alleged crime occurred.⁷ The existence of these rights afforded the appellant in a criminal trial are not in issue on this appeal. The only questions presently before the court are whether venue may be waived and, if so, when.

The courts have consistently held that an appellant may waive his constitutional right to a trial in the state and district in which the alleged offense was committed.⁸

In *United States v. Gallagher, supra*, the Court said in referring to the venue provisions of the Sixth Amendment and Article 3, Section II, Clause 3 of the United States Constitution:

“ . . . the venue specified by these provisions, like other venue provisions, is a procedural right, which, while in the broad sense for the protection of the public generally, is in a very special sense a privilege accorded to the individual member of

⁶Article 3, Section 2, Clause 3 and the 6th Amendment of the United States Constitution.

⁷Federal Rules of Criminal Procedure, Rule 18.

⁸*United States v. Gallagher*, 183 F. 2d 342, 346 (3rd Cir. 1950); *Lafoon v. United States*, 250 F. 2d 958 (5th Cir. 1958); *Walker v. United States*, 218 F. 2d 80 (7th Cir. 1955); *Stoppelli v. United States*, 183 F. 2d 391 (9th Cir. 1950).

the public who has been accused of crime. Accordingly, as in the case of the other procedural privileges conferred upon accused persons by these particular clauses of the Constitution, *the venue privilege may be waived by an individual defendant.*" (Emphasis Added.)

The cases also uniformly hold that a defendant may waive his statutory right to a trial in a particular division of a specified district.⁹ In *Bistram v. United States*, 253 F. 2d 610 (8th Cir. 1958) the appellant argued that the Southeastern Division of the District Court of North Dakota was without jurisdiction to impose the judgment and sentence inasmuch as the offense was alleged to have been committed in the Southwestern Division of the District. The Court in rejecting appellant's claim quoted Rule 18 of the Federal Rules of Criminal Procedure and then stated:

" . . . however, it is well settled that this [Rule 18] is a venue privilege which may be waived by the accused."

B. The Appellant Waives Any Objection He Might Have Had to Being Tried in One Division of a District Rather Than Another When He Fails to Take Exception to Venue Either at Trial or During His Direct Appeal.

Waiver of venue has been considered in numerous cases, the vast majority where the defendant raised the venue point for the first time on his direct appeal. In the instant matter defendant, represented by coun-

⁹*Bistram v. United States*, 253 F. 2d 610 (8th Cir. 1958); *United States v. Cohoate*, 276 F. 2d 724 (5th Cir. 1960); *Walker v. United States*, 218 F. 2d 80 (7th Cir. 1955).

sel, not only did not raise the venue point at trial but never even mentioned venue during the subsequent appellate proceeding, resulting in the affirmation of the District Court conviction.

Uniformly the courts have held that a defendant waives his objection as to venue by going to trial on the merits, or by not objecting to the place of the trial until after the Government has completed its case. In fact the cases held venue is waived even where, by a defect in the charge, venue is not observable from a reading of the indictment.¹⁰

In the present case there is even more reason to hold that defendant has waived any possible objection to venue. Here, the indictment on its face discloses venue of the court was in another division as to eight counts of the indictment, now under attack. Regardless of this, the defendant did not object or raise this point until this late date. This Circuit has already held in a similar case, *Rodd v. United States*, 165 F. 2d 54 (9 Cir. 1947), that objections to venue are waived by the failure to object during trial where the indictment shows on its face that venue is not properly laid. Also see, *United States v. Brothman*, 191 F. 2d 70. (2 Cir. 1951.)

The cases cited by the appellant are not relevant to the issues of this appeal. The *Borow* and *Johnson* cases¹¹ do not involve the question of venue, the deci-

¹⁰*Stoppelli v. United States*, 183 F. 2d 391, 395 (9th Cir. 1950); *Thomas v. United States*, 267 F. 2d 1 (5th Cir. 1959); *United States v. Fabric Garment Co.*, 262 F. 2d 631, 641 (2nd Cir. 1958).

¹¹*United States v. Borow*, 101 Fed. Supp. 211 (D.C.N.J. 1951); *United States v. Johnson*, 323 U. S. 273 (1944).

sive issue in this appeal. *United States v. Jones*, 174 F. 2d 746 (7th Cir. 1949), deals solely with the sufficiency of evidence necessary to prove venue, a point not in issue in the current proceeding.

V.

Conclusion.

The question of whether the trial of a Federal offense should be in one particular district or division rather than another is solely a matter of venue and does not raise any jurisdictional problem. Uniformly, courts have held that an appellant may waive non-jurisdictional claims such as the alleged impropriety of trial in one division or district rather than another. Since the record in the instant case indicates the appellant did not raise any venue question at his trial or at any time during his subsequent appeal, the appellant is deemed to have waived any question concerning the propriety of being tried on all counts of his indictment in the Central Division of the Southern District of California.

Respectfully submitted,

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No. 17,056 ✓

**United States Court of Appeals
For the Ninth Circuit**

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

**Appeal from the United States District Court for the
Northern District of California, Southern Division**

BRIEF FOR APPELLANTS

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No. 17,056

United States Court of Appeals For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division

BRIEF FOR APPELLANTS

JURISDICTION

This is an appeal from a judgment for property damage caused by flood waters in the American River in 1953, during the construction of the Folsom Dam.

Appellants are respectively Delaware and Connecticut corporations.¹ Appellee is a California corpora-

¹T. 7, 8.

tion.² The amount in controversy exceeds \$10,000.00, exclusive of interest and costs.³ Therefore, the District Court has jurisdiction under Title 28, U.S.C.A. §1332.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Title 28, U.S.C.A. §1291.

STATEMENT OF THE CASE

The case arises in this way. Appellants were building the Folsom Dam, under contract with the government. Appellee was building a power plant adjacent to the dam, under contract with another branch of the government. Pursuant to their contract, appellants erected a temporary dam (called a "cofferdam") to hold the water back from the permanent dam during construction, and another cofferdam below the permanent dam to prevent backing up of water from below. During high water, the upstream cofferdam gave way on January 9, 1953, and the resultant flow damaged the works of appellee. Thereafter appellants reerected the upstream cofferdam, and it gave way again on May 20, 1953, again damaging appellee's works.

Appellee sued for the damage thus suffered, claiming that it was due to the negligence of appellants.⁴ It claimed that the damage due to the January 9th in-

²T. 7.

³T. 8. Pre-Trial Order states that the amount in controversy exceeds \$3,000, which was the jurisdictional minimum when suit was brought. The amount prayed for in the complaint exceeded \$10,000. T. 11, 12.

⁴Appellee also sued the U.S.A. The case against the U.S.A. was tried in conjunction with the suit against appellants but matters

cident was \$493,787.69, and that the damage due to the May 20th incident was \$25,975.04, or a total of \$519,761.73. The jury gave appellee a verdict for the full amount prayed for, namely \$519,761.73. From the judgment for that amount, this appeal is taken.

Two questions are involved in this appeal, and they arise as follows:

First Question

Appellee claimed that appellants were negligent in the maintenance of the cofferdams in several respects. One of the claims was that appellants left the upstream cofferdam in too long on January 8 and 9, and that if they had breached it when the water was rising the damage would have been avoided. Appellants contend that they were bound under their contract with the government to leave the cofferdam in as they did; that that exempted appellants from liability for such claim; and that the trial court erroneously withheld that defense from the jury.

Because appellants were not so bound with respect to the May 20 incident, appellants do not contend that the government contract defense applies to that incident and therefore what happened on that date may be disregarded in the argument on this point.

Second Question

As stated, the jury awarded all the damages prayed for by appellee. Appellants contend that \$110,000.00

of fact and law relating solely to the case against the U.S.A. were presented outside the presence of the jury. Appellee dismissed against U.S.A. prior to submission to the jury of its case against appellants.

of the judgment is improper because the evidence fails to show damage in that amount.

SPECIFICATION OF ERRORS

Appellants rely upon four errors as grounds of this appeal. These errors are enumerated below. The first three relate to the *First Question* above mentioned. The fourth relates to the *Second Question*.

Of the group of the first three errors, the first one consists in the court's refusal to give the jury an instruction requested by appellants which would have afforded to appellants the defense that they acted in compliance with their contract with the government, and the second and third consist in the giving of two instructions which in effect affirmatively deprived appellants of that defense and augmented the error of refusal to give appellants' requested instruction.

The Errors

The errors relied upon, and the grounds of objection urged at the trial, are as follows:

1. Refusal of an Instruction

The District Court erred in refusing to give the jury Instruction No. 13, requested by appellants. Because of its length, we have placed the full text of this instruction in the Appendix to this brief.⁵ In essence, the instruction was to the following effect:

⁵T. 41-43.

Where a party like these appellants contracts with a public agency like the U.S.A. to construct a dam according to plans and directives, and the contractor performs the work with proper care in accordance therewith, but the work results in damage to others such as appellee, the contractor is not liable for such damages unless the plans or directives were inherently dangerous and defective and the contractor knew, or in the exercise of ordinary care should have known, that they were. It is a question of fact for the jury to determine whether the defense afforded by this doctrine is a defense to the defendants in this case, and in this connection the jury may consider whether there was inherent danger, and whether the defendants knew or should have known that there was such danger, in the plans and directives relating to the matters in issue which were specified in the instruction.

Under Rule 51, appellants filed their objection to the court's refusal to give the above instruction, the objection being, in effect, that appellants were required by their contract to keep their cofferdam in place up to the time of the flood on January 9, 1953.⁶

2. Giving an Instruction

The District Court erred in giving an instruction relating to the above subject. This instruction,⁷ too, we have placed in the Appendix, because of its length. The instruction stated that, subject only to the con-

⁶T. 1779-1781.

⁷T. 1760, 1761; 1785, 1786.

tract specification of the elevation of the upstream cofferdam, namely, a minimum of 237 and a maximum of 250 (which means feet above sea level), appellants had the responsibility and discretion to determine the design, construction, operation and maintenance of the cofferdam, including whether to breach it or let the water overtop it.

Appellants excepted to the instruction, as follows:

“Mr. Driscoll. . . . the defendants take exception to the instruction of the Court which stated to the jury as a matter of law the meaning of the contract, on the grounds that we feel here that the discretion that we had, as stated by the Court, was covered by the contracts and Supplemental Agreement No. 1, and the evidence, on the day of January 9th and that the defendants’ Instruction No. 13, I believe it is, concerning the government contract defense should have been submitted to the jury.”⁸

3. Giving an Instruction

The District Court erred in giving an instruction (set out in the Appendix⁹) in which it explained to the jury that the contract between the government and appellants for the construction of the dam and the contract between the government and appellee for construction of the power plant were entirely separate and that the provisions of these two contracts did not create any rights or obligations between appellants and appellee.

⁸T. 1776, 1777.

⁹T. 1746-1748; 1786-1788.

Appellants' exception to the instruction in Specification No. 2 is applicable to the instruction last quoted.

4. Lack of Evidence as to \$110,000.00 of Damage.

The evidence is insufficient to support the judgment of \$519,761.73 in respect to the award therein for \$110,000.00 for appellee's claim of "premium time and other costs to avert 1954-55 winter losses" and "loss of job momentum and interference with job efficiency" for the occurrences of January 9, 1953 and May 20, 1953.¹⁰

ARGUMENT

I

THE COURT ERRED IN WITHHOLDING FROM THE JURY THE DEFENSE THAT APPELLANTS ACTED PURSUANT TO ITS GOVERNMENT CONTRACT

The Claims of Negligence

Appellee claimed that appellants had been guilty of negligence in the following principal respects:¹¹

(1) Faulty materials in the upstream cofferdam;

(2) Faulty protective covering around discharge pipes in the cofferdam;

(3) Raising the cofferdam from elevation 237 to 250 in the flood season;

(4) Maintaining it without a prudent plan for controlled, safe release of water in the flood season; and

¹⁰T. 1789.

¹¹These claimed acts of negligence were enumerated in an instruction given by the trial judge. T. 1755, 1756.

(5) Failure to breach the cofferdam (also the lower cofferdam) on the day of the flood.

Government Contract Defense

Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government.¹²

The doctrine of this defense is undisputed. It is this:

Where a plan in a government contract is not inherently dangerous, or the contractor is not chargeable with knowledge of such danger, and where he follows the plan, and commits no independent negligence in so doing, he is not liable for damage to property of others resulting from the execution of the plan.

Marin Water District v. Peninsula Paving Co.
(1939), 34 C.A. 2d 647, 94 P. 2d 404;

Hamilton v. Harkins (1956), 146 C.A. 2d 566,
304 P. 2d 82.

The rule was stated in the *Marin Water District* case as follows (pp. 652, 653):

“So far as the contractor is concerned, the proper rule of liability is thus stated in *Northwestern Pac. R.R. Co. v. Currie*, 100 Cal. App. 173, at p. 175 [279 Pac. 1057]:

‘Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results

¹²T. 10, 11.

in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (citations); but where the contractor departs from the contract, plans or specifications, or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed. (citations).’ ”

The doctrine was restated in the *Hamilton* case (p. 570):

“Although the language used in some of the cases has not always been consistent, we think the proper rule is that on public work a contractor is liable to the damaged property owners only where he is negligent in the performance of the contract . . . , or, where the plans are defective, the contractor knows or should have known that the defect existed and that if the contract were performed as specified damage might ensue. But the contractor is not liable where the plans and specifications prepared by a public agency are defective but the contractor has no knowledge, express or implied, of the defect.”

The Trial Court Withheld the Defense From the Jury

As seen above, the trial court refused to submit the defense to the jury. It did so in two ways: by refusing to give the instruction on that subject requested by appellants, and by giving instructions which said that the maintenance of the cofferdam was a matter within

the discretion of appellants and which therefore placed on appellants the responsibility for the damage resulting from the plan if the jury thought the damage was so caused.

The sole issue on this point is whether the court erred in this ruling; and that depends on the terms of the contract and on the other facts of the case.

In considering the facts, it may be of some assistance to have in mind the issues a little more in detail.

Appellee contends—and the trial court concurred—that in respect of all the items of claimed negligence, appellants had discretion, under their contract, to do what they did. Appellants, on the contrary, contend that while they did have such discretion with respect to the first three items of claimed negligence, namely, the character of materials in the upstream cofferdam, the insulation of the discharge pipes, and the height of the cofferdam (within the range of elevation 237 to 250), they did not have discretion in respect of the remaining two claims of negligence, namely, lack of a plan for control of the water, and failure to breach the cofferdam, in which latter two respects they were bound by the contract and directives of the government.

There are three elements of a government contract defense:

1. That the contractor followed the plan;
2. That he did so without negligence, independent of the plan itself; and

3. That the plan was not inherently dangerous (or if it was, that the contractor did not know it, or was not chargeable with knowledge of it).

Here, appellants followed the plan. That fulfills the first requirement.

Whether appellants were negligent or not was at issue. Appellee said that appellants were exercising their discretion and in so doing had committed negligence, in all five respects. Appellants contend that they were not negligent in any respect, and on the last two grounds—namely, the maintenance of the cofferdam in the flood season—appellants contend that they were not free, but were bound by the contract to leave the cofferdam in as they did.

On the question whether the plan was inherently dangerous or not, the issue was this. Appellants contend that it was not inherently dangerous. Appellee admits this on condition that appellants were not bound by the contract as above stated, but appellee contends that if appellants were so bound then the plan itself was inherently dangerous.

As a practical matter, for the purpose of this appeal, we could now narrow the issue to the following:

Regarding our maintenance of the cofferdam until the time of the flood, we contend that all the elements of the government contract defense are present, namely:

1. We did not depart from the plan;
2. We were not negligent in carrying out the plan—we do not have to maintain this as a matter of law,

but merely show that there was evidence which would have justified a finding by the jury to that effect; and

3. The plan was not inherently dangerous—again, all we have to show is that the jury could have so found.

On the issues other than leaving the cofferdam in until the flood, the evidence was in conflict, justifying a verdict either way. The point on appeal is that on one of the issues at least, namely, leaving the cofferdam in as was done, we were entitled to raise the government contract defense, and since there is no way of telling on what ground the jury held appellants liable, the error of excluding that defense was prejudicial.

Therefore the evidence should be reviewed from the standpoint of the questions:

Were we required by the contract and directives of the government to leave the upper cofferdam in as we did? and

Was the plan not inherently dangerous as thus interpreted—or if it was, were we unaware of it, and innocently so?

If the evidence, even though in conflict, would support a positive finding on these two questions, the ruling of the trial court was erroneous and ground for reversal.

The Evidence Shows That the Government Contract Defense Should Have Been Presented to the Jury

The Terms of the Contract and the Events That Happened

On September 13, 1951, appellants (whom we shall call Merritt-Savin) contracted with U.S. Army Corps of Engineers (Corps) to build Folsom Dam. The plan was this. To keep the dam site dry, in order to build the dam, Merritt-Savin were to build a cofferdam above the dam site and another one below it. The upper one, of course, was to hold the water back. The water would then be diverted around the dam site by an underground tunnel, supplied by the government through another contractor. This tunnel released the water back into the river bed at a point below the dam and below the lower cofferdam. The lower cofferdam would prevent the released water from backing up against the permanent dam from below.

On April 10, 1952 appellee (Atkinson) contracted with the U.S. Bureau of Reclamation to build a power plant adjacent to the dam. Atkinson built a cofferdam of its own, which was between the permanent dam and Merritt-Savin's lower cofferdam. It consisted of large steel cells filled with rock and dirt connected up with a concrete wall which was part of Atkinson's permanent works. Its purpose was to keep water out of its work area if the river should overflow Merritt-Savin's upper cofferdam and permanent dam.

The flood in question occurred on January 9, 1953, when the river overtopped the Merritt-Savin upper cofferdam and swept it away, overtopped the permanent concrete dam then being built, and then knocked

down a portion of Atkinson's cofferdam resulting in the damages here sued for.

A few photographs in evidence^{12a} furnish a view of these works. Exh. A-1 is an aerial view of the whole area. It shows the upstream cofferdam, the concrete beginnings of the permanent dam, the Atkinson cofferdam, and at the left bottom the downstream cofferdam. It also shows the route of the diversion tunnel by which the water from the river above the upstream cofferdam was diverted around the dam site and released through the tunnel outlet below the lower cofferdam. Exh. A-3 gives a closer view of the upstream cofferdam and of the concrete base of the permanent dam in construction. Exhs. M-205 and M-207 show the Atkinson cofferdam, which was later damaged by the flood.

In the contract, Corps agreed to furnish the diversion tunnel by March 1, 1952.¹³ Early in 1952, they discovered they could not do so, but they agreed to furnish it on June 19, and they directed Merritt-Savin to begin to divert at that time.¹⁴ To "divert" means to build the upper cofferdam, which would stop the flow through the natural river bed and thus cause it to run down through the diversion tunnel, its only means of escape. This change was embodied in what

^{12a}By stipulation and Court order, exhibits were not printed but are to be considered in their original form. Exhs. M-205 and M-207, which are 8 x 10 photos and which are mentioned below in the brief, are bound in a book with other photos of the same size.

¹³Exh. A-16-A, Part IV, Sec. 1-02, pp. 1-1, 1-2.

¹⁴T. 1195-1197.

is known as Supplemental Agreement No. 1, further explained below.

In dam building, the year is divided into two seasons: the flood season and the diversion season. Roughly speaking, the first six months are the flood season and the second six months the diversion.¹⁵ The object in dam building is to get the permanent dam up to sufficient height to act as its own cofferdam in the first diversion season. If this is achieved, and if the cofferdam is washed out by the winter flow, the effect is this: water runs through the diversion tunnel to the extent of its capacity; the remainder accumulates in a pool above the permanent dam structure; and if there is any excess, it flows over the top of the permanent dam, which, being concrete, is not damaged. Then, when the stream subsides, the work area below the dam is pumped out, and construction is resumed. If the contractor cannot get the permanent structure high enough to achieve this purpose in the first diversion season, then, when the upper cofferdam is swept out by flood waters, the permanent works are submerged and work stops, usually for the season, thus causing costly delay in completion of the dam. Ordinarily, there is also damage to the contractor's works. Therefore, there is a two-fold objective: first, get up the cofferdam and start work on the permanent dam as early as possible in the year, and secondly, stay in the river, i.e. keep working on the permanent dam, as long as possible.

¹⁵T. 1560.

In some years, the water level would never rise above the top of the cofferdam,¹⁶ in which case there would be no interruption of the permanent dam. That would be ideal. The next best result would be that by the time the water overtopped the cofferdam the permanent dam would have been brought up to a sufficient height to serve as its own cofferdam. And if neither of these results were achieved, the object would be to stay in the river as long as possible. The reason for the latter is that while the water is rising there is always the chance that it may subside without overtopping the cofferdam, and even if it does overtop, the longer the contractor stays in the river the more progress he can make on the dam.

On the other hand, care must be taken that the cofferdam be not too high, because if it is, the pool which it creates may be so big that if the cofferdam should collapse from overtopping the quantity of water thus released may overflow the river channel proper and cause riparian damage below.¹⁷

All these possibilities were calculated in the present case. This is revealed in the testimony of Jack D. Brooks, Chief of the Dam Design Section of the Corps on the Folsom Dam project,¹⁸ and of Colonel Clarence C. Haug, Corps Engineer on the project,¹⁹ which was to the following effect:

¹⁶In the past 40 years, the flow would have exceeded the capacity of the diversion tunnel and overtopped the cofferdam 3 times to Dec. 1, 8 times to Dec. 15, and 13 times to Jan. 1. T. 792.

¹⁷T. 958; 1122, 1123.

¹⁸T. 949.

¹⁹T. 1120, 1121.

The specifications of the contract contemplated an earth cofferdam, which was expected to wash out when overtopped.²⁰ Overtopping would occur when the river exceeded the capacity of the diversion tunnel.²¹ The Corps studied the maximum flow of waters over the years to determine the height of cofferdam which, if overtopped, would not cause damage downstream.²² So the contract (as amended) provided that the upper cofferdam should be not less than 237 nor more than 250 elevation.²³ Merritt-Savin had discretion to erect it anywhere within those limits.²⁴ The diversion tunnel was built to carry 12,000 cubic feet of water per second for a cofferdam of 237 feet elevation and 15,000 cubic feet of water for a cofferdam of 250 feet elevation.²⁵ On the basis of the height reached by the river in previous years, the government calculated that the cofferdam would be washed out during the winter. On the average, they calculated that that would occur above November 15th, though it might not be until January. Raising the cofferdam from elevation 237 to 250 increased the chances of the contractor staying in longer.²⁶ The ordinary consequence of the cofferdam being swept out would be that the contractor's work would be suspended until June or July.²⁷

²⁰T. 1098, 983.

²¹T. 959.

²²T. 958, 1122, 1123.

²³Exh. A-16-A, Part IV, Sec. 1, page 1-2.

²⁴T. 1086, 1087.

²⁵T. 961.

²⁶T. 1178, 1068.

²⁷T. 959, 960.

Merritt-Savin first built the cofferdam to elevation 237, and then increased it to elevation 250.²⁸

The contract (as amended) provided that the contractor should try to get the concrete dam up to elevation 220 by the end of the first diversion season.²⁹

Another provision:

“If the concrete dam section is sufficiently above streambed before overtopping of the cofferdam at the end of the first diversion season, diversion through the tunnel during the flood season shall be continued, except for intermittent overtopping by floods, and no water shall be passed through the conduits in the dam. If the concrete dam section is not sufficiently above river level to continue diversion after overtopping of the upstream cofferdam at the end of the 1952 diversion season, the river shall be rediverted by reconstructing the cofferdams at the end of the flood season and diversion carried through the tunnel after the overtopping of the cofferdam in 1953.”³⁰

While this clause does not specify what “sufficiently above streambed” would be, it seems clear that it means 220 feet—the elevation which the contractor was to strive for, as provided in a clause in the contract shortly preceding the above quoted clause.³¹

²⁸T. 777, 1068, 1069.

²⁹Exh. A-16-A, SC-42 *d*.

³⁰Exh. A-16-A, SC-42 *f*.

³¹This elevation was originally specified as 215 feet; then it was changed by Addendum No. 1 to 225; and finally changed to 220 by Supplemental Agreement No. 1. Exh. A-16-A, SC-42 *d*; Exh. M-20.

Therefore, the plan contemplated that if the cofferdam overtopped in the winter of 1952-53, and if at the time of that overtopping the concrete dam was below 220 feet, the work would be suspended until the next season. This in turn contemplates that the overtopping of the cofferdam would cause it to be washed away. All these things so happened; that is, the cofferdam did overtop in the first diversion season, with the result that it was swept away, and the low monolith of the concrete dam at that time was only 143 feet.³²

To return to the contract—bearing in mind that we are looking at it to see if it did not require compliance by the contractor with government directives regarding maintenance of the cofferdam:

It stated that “The work will be conducted under the general direction of the Contracting Officer . . .”³³ (that is, the government).

It required the contractor “to prosecute (the) work with faithfulness and energy, and to complete the entire work ready for use not later than 1,200 calendar days after date of receipt of written notice to proceed.”³⁴

It required progress reports, and if, in the opinion of the Contracting Officer, the Contractor falls behind schedule “the Contractor shall take such steps as may be necessary to improve his progress and the Contracting Officer may require him to increase the number of shifts . . .”³⁵

³²T. 1567.

³³Exh. A-16-A, SC-17.

³⁴Exh. A-16-C, page 2; Exh. A-16-A, SC-01.

³⁵Exh. A-16-A, GC-05 a, b and c.

It provides that failure to comply with requirements shall be grounds for determination that the contractor is not prosecuting the work with diligence insuring completion within the time specified and that the government may then terminate his right to proceed.³⁶

“The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government.”³⁷

It may order extras or make changes within the general scope of the specifications.³⁸

The contract specifies in detail the order of the work, including, in its proper place, diversion of the river.³⁹

“During the first diversion season”, it provides, “the efforts of the Contractor shall be concentrated on excavating and preparing the foundations in the main cofferdam area . . . and placing concrete in the dam section proper up to Elevation 220 (as amended) by the end of the first diversion season.”⁴⁰

Other provisions:

“The Contractor shall not store water in back of the dam or interfere with the natural flow of water during the period of construction except

³⁶Exh. A-16-A, GC-05.

³⁷Exh. A-16-A, GC-11.

³⁸Exh. A-16-3, par. 3, page 3.

³⁹Exh. A-16-A, SC-42.

⁴⁰Exh. A-16-A, SC-42 *d*.

as necessitated by diversion requirements, unless specifically approved or directed.”⁴¹

“The Contractor will be responsible for loss or damage to the diversion structure, construction plant, and any part of the temporary or permanent work, due to failure or inadequacy of any part of the diversion or unwatering program, or due to overtopping of the cofferdams, . . .”⁴²

“After the river and local drainage have been diverted from a construction area, all water therein shall be removed by adequate pumps or other means and, upon completion of the excavation, the entire foundation area shall be maintained free from running or standing water to permit inspection of the foundation and placing of embankment and concrete in the dry.”⁴³

As mentioned above, the government failed to furnish the diversion tunnel on March 1. Against Merritt-Savin’s objections, it declined to postpone the operation until 1953 because of the large loss the government would incur thereby, and it insisted on proceeding on June 19. This greatly increased the risk that Merritt-Savin would be unable to get the concrete dam up to 220 feet before overtopping of the cofferdam. Accordingly the government bound itself as per Supplemental Agreement No. 1.⁴⁴

Supplemental No. 1 recited that the government had failed to deliver the diversion tunnel on March 1 and

⁴¹Exh. A-16-A, Part IV, Sec. 1-02 b.

⁴²Exh. A-16-A, Part IV, Sec. 1-03.

⁴³Exh. A-16-A, Part IV, Sec. 1-05.

⁴⁴Exh. M-20.

had delivered it on June 19, 1952,⁴⁵ and that that had delayed the operations of the contractor and increased its risk. The risk referred to was that by beginning so late the contractor might not get the permanent dam up to 220 feet by the time of overtopping, with the result—as happened—that when the cofferdam went out, the resultant flood wave would damage the contractor's works,—which it did, in excess of \$800,000.00.⁴⁶

By way of amendment of the main contract, Supplemental provided that if diversion were performed by the contractor as per progress schedule approved by the government, and the diversion works were overtopped by a flood which damaged the cofferdams, construction trestle, stationary equipment or the works protected by the cofferdams, the contractor would make the repairs necessary to permit resumption of the work, and that he would be paid for such work, except that the government's liability to make such payment would not include damaging overtopping occurring after June 15, 1953 or the date on which the low monolith of the main dam was completed to elevation 220, whichever occurred first, and also that the payments to the contractor for such repairs would not exceed \$500,000.00.

Supplemental No. 1 also provided "that during the period of the Government's liability as delineated

⁴⁵Though the supplemental agreement had been entered into prior to June 19, the document itself was not signed until after that date.

⁴⁶Exh. A-65.

above, the Contractor shall work as large a force of men and as much plant as much time as practicable, but in any event not less than twelve 10 hour shifts per week unless impossible, on the river diversion and all work protected by the cofferdams.”

Such are the main terms of the contract bearing on the question whether appellants’ actions on the day of the flood were done in *compliance* with the contract as *required* by it. Now, to procure further light on the question, let us look briefly at what happened on that day, especially the control that the government actually exercised over appellants on that occasion.

The night before—about 10:30 P.M. on January 8—Corps engineer Burks received a telephone call from the Corps guard that the river forecast was formidable. He went to the scene and inspected it; then advised Jenkinson, Project Engineer of the Corps, and representatives of Merritt-Savin and of Atkinson. About 1:00 A.M., January 9, he suggested to Merritt-Savin that they seriously consider moving certain heavy equipment to higher ground. They did so, shortly thereafter.⁴⁷

During the day of January 9, Burks received weather and river forecasts and relayed them to the interested parties.⁴⁸ Shortly after noon, he recommended to Merritt-Savin that they not start placement of one of the concrete monoliths.⁴⁹

⁴⁷T. 1449-1453; 1466.

⁴⁸T. 1455, 1456.

⁴⁹T. 1454.

Stinson, Project Manager of Merritt-Savin, testified that in the early morning of January 9 he suggested to the Corps Project Engineer, Jenkinson, that Merritt-Savin take all their equipment out. He continued:

“Q. What did Mr. Jenkinson say when you suggested to him that you move your equipment out?

A. He wanted to call Sacramento office.

* * * * *

Q. Do you know whether or not Mr. Jenkinson did call the Sacramento office?

A. He must have. He came back and told me not to pull it out, that Mr. Morton said not to pull it out until they let us know.

* * * * *

Q. Can you fix the approximate time of that statement?

A. I don't know. It was sometime after the conversation about it. I don't know. Say 10:00 o'clock, in the neighborhood of 10:00 o'clock, if you want to.”⁵⁰

Stinson testified that around noon, January 9, “they told us to pull the equipment out, that it (the upstream cofferdam) would probably be overtopped”; that at that time he did not think of breaching the cofferdam because the Corps “wanted to hold it as long as they could.”⁵¹

He said that Merritt-Savin then started to remove their equipment and had got most of it out around 5:00 P.M.⁵²

⁵⁰T. 1512, 1513. Also T. 1522.

⁵¹T. 1504, 1505; 1501.

⁵²T. 1514.

Burks testified that at about 4:00 P.M., January 9, his superior, Jenkinson, told him "by radio to tell Mr. Stinson to cut a notch in the top of the upstream cofferdam". Then:

"Q. You relayed that message to Mr. Stinson?

A. Yes, sir.

Q. And was such a notch cut?

A. Yes, sir."⁵³

Stinson testified that around 6:00 P.M. leakage developed around the discharge pipes; and that after quite a few minutes "it commenced letting go and washing out . . ."⁵⁴

Jonathan Goodier, an Atkinson engineer, testified that he saw a caterpillar cutting a notch in the middle of the cofferdam, and that water seeped through this notch.⁵⁵ By 6:09 P.M. the water was spilling over the cofferdam and the cofferdam was opening quite rapidly and the water was gushing through.⁵⁶ From the sudden flow of water, damage to the works of both appellants and appellee resulted.

Appellants Acted As Required by the Government.

The issue is now clear. Appellee says we should have breached the cofferdam earlier, before the water reached damaging proportions. We answer that we were bound under our contract not to do so. On the day in question, the government directed us not to

⁵³T. 1454, 1455. Photo of notching, Exh. A-3; T. 1478, 1479.

⁵⁴T. 1520, 1521.

⁵⁵T. 241-243.

⁵⁶T. 301.

do so until the moment we did. There is no question about that. The only question is whether we were bound under the contract to defer breaching until the government consented. As to that, we say we were so bound.

First, we ask the Court to consider Supplemental Agreement No. 1. As shown above, that Agreement provided that the government would pay to appellants up to \$500,000 for damage suffered by appellants for overtopping occurring prior to June 15, 1953 or the date when the low monolith of the main dam reached elevation 220. Then, as above shown, it provided "that during the period of the Government's liability as delineated above, the Contractor shall work as large a force of men and as much plant as much time as practicable, but in any event not less than twelve 10 hour shifts per week unless impossible, on the river diversion and all work protected by the cofferdams." Could appellants have breached the cofferdam without the consent of the government and even against its express prohibition, and thus have interrupted the work for several months, without fear of breaking that clause of the agreement? We think not. The clause requires the contractor to continue its work on the dam at maximum capacity and speed. To flood the works, with such consequent delay, would be a clear violation of the clause.

This conclusion harmonizes with the provision in Special Condition 42 *f* above quoted, that if the concrete dam is not sufficiently high to continue diversion after overtopping of the cofferdam at the end of the

1952 diversion season, the cofferdam shall be reconstructed "at the end of the flood season" and the river thus be rediverted. In other words, there was a contrast between the situation prior to the overtopping and afterwards. Prior thereto, the situation was this. The government had put the contractor in the river late in the 1952 season. For this it agreed to indemnify him for his risk to the end of that flood season and it required him to work at top speed during that time. *After* overtopping, the contractor would be entering the river at a normal time, i.e. "at the end of the flood season", and the reasons for the extraordinary provisions in Supplemental Agreement No. 1 would not apply.

Moreover, numerous provisions of the contract lead to the conclusion that appellants were bound by government directives on this matter. These clauses have been set forth above. We mention especially the following:

The contract provided that the contractor was to concentrate on getting the concrete dam up to elevation 220 in the first diversion season, because if that had been accomplished work on the dam could have continued, with perhaps a few temporary interruptions, throughout the flood season; whereas breaching the cofferdam on January 8 or 9 ended the work for the season. It provided that the contractor had to work with faithfulness and energy to get the work done within a specified time; that the government could require him to increase the number of shifts to keep up with schedule; that after diversion the con-

struction area was to be kept dry; that the work was to be conducted under the general direction of the government; and that for failure to comply with requirements the government could terminate the contract.

In view of these provisions, could Merritt-Savin, on January 8 or 9, have breached the cofferdam, against the explicit direction of Jenkinson, Project Engineer of the government without fear of violation of the contract? We think clearly not. And we think that at the very least a jury could have so found.

It is easy to look back now and say, the cofferdam should have been breached before the water reached threatening proportions; but the decision had to be made *then*, when the height that the water would eventually reach was unknown. As Colonel Haug, the Corps man, testified, "As of today, my 20-20 hindsight is very good, and I say it would have been a prudent thing to remove the cofferdam on the 8th of January."⁵⁷ *Before* the breach, the government had to act on *foresight*, and they decided to stay with the situation until the afternoon of the 9th, and it would have been a rash contractor who would have defied them.

For the purpose of this case, all we have to establish is that it could reasonably be inferred, from the wording of the contract and all the surrounding facts, that such was the intention of the parties; because when such is the case, it is a question of fact for the jury. That is, while construction of a contract is

⁵⁷T. 1131.

ordinarily for the court, where the terms of the contract are uncertain and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, and conflicting inferences may be drawn therefrom as to what that intent is, it is a question of fact for the jury.

Hawkins v. Frick-Reid Supply Corporation
(1946), 154 F. 2d 88, 89;
53 Am. Jur. 229, 230;
65 A.L.R. 652.

We submit that all the elements of the above doctrine are present in this case.

The reason why appellants do not claim the government contract defense with respect to the May 20 incident is that the government had left appellants to their discretion when to reenter the river and how long to leave the new cofferdam in on that occasion.

The Plan Was Not Inherently Dangerous

Appellee conceded that there was nothing inherently dangerous about the plans and specifications, *except* that appellee contended that if the plans and specifications were to be interpreted as requiring that the cofferdam be left in position until it overtopped and washed out, then the plan was inherently dangerous.⁵⁸

The answer to this is that the question whether the plan was inherently dangerous, or if it was, whether appellants knew or should have known that it was, was not a matter of law, but a question of fact for

⁵⁸T. 1376; 1381, 1382.

the jury to determine; and the instruction requested by appellants for the purpose of putting the government contract defense in issue would have presented that question to the jury.

We believe, therefore, that this does not raise a serious point on this appeal.

Before leaving this point of the government contract defense, it is interesting to note that in ruling on the point a long colloquy occurred between the trial court and counsel, in which the court asked counsel for appellee if he was willing to accept the burden of a ruling in his favor and counsel said he was. The substance of the colloquy on this point is disclosed in the following excerpts from the transcript:

“The Court. . . . since this is a key question in this case, and it involves what I consider to be, perhaps, the best law question in the case—and when I say ‘best,’ I mean the ‘nicest’ in the terms of the most difficult to decide.

Mr. Johnson. Do I want to risk it?

The Court. Are you willing to accept the burden of having to carry an affirmative ruling in your favor where, if the instruction were given and you had a verdict anyway, you wouldn’t have the infirmity in the case?

Mr. Johnson. I understand fully the responsibility, and I am able to answer immediately, we certainly will carry that burden.

* * * * *

The Court. Well, I asked that question because to me there are, sometimes, alternatives that you can take in close questions.

Mr. Johnson. Well, I don't think there is an alternative here.

The Court. Where you can take, what should I say, a less hazardous position. And this is not to say that there is any vacillation here from the point of view of any party, but it creates in my mind a most serious question, where it is conceded that there is no defect in planning, that then the party who is carrying out plans can rely upon the plan to relieve them of responsibility.

Mr. Johnson. That's right.

The Court. And if they carry out the plan properly, then there is no negligence. Doesn't that stand on its own, if they carry out the plan properly?

Mr. Johnson. Surely.

The Court. Your position is, I take it, unequivocally that they didn't carry out the plan properly.

Mr. Johnson. That is right, and it is a simple question of negligence. That is exactly right."^{58a}

We submit that the apprehension expressed by the trial judge was well founded, and that to ensure a fair trial to appellants, the "close" and "most serious question" he referred to should have been decided the other way.

II

IN ANY EVENT, \$110,000.00 OF THE JUDGMENT WAS IMPROPER

Even if appellants were liable, the evidence fails to support the judgment to the extent of \$110,000.00.

^{58a}T. 1403-1405.

The total judgment is \$519,761.73, which is the whole amount prayed for. This sum is divided as follows:

Damages due to the January 9, 1953 incident:

Loss of and damage to equipment and building	\$ 33,183.06
Reconstruction and repair of the concrete and steel cellular cofferdam	225,978.32
Pumping out area of power house site and removal of muck and debris	108,578.80
Increase in wages payable by reason of fact that plaintiff's work was delayed	18,580.12
Additional interest payable by reason of the delay on money borrowed to finance the work..	7,467.39
Premium time and other costs to avert 1954-55 winter losses....	50,000.00
Loss of job momentum and interference with job efficiency.....	50,000.00
	<hr/>
	\$493,787.69

Damages due to the May 20, 1953 incident:

Moving equipment, materials and supplies out of the Power Plant site area, pumping out water and removal of debris; moving equipment, materials and supplies back into Power Plant site area	\$ 15,974.04
Premium time and other costs to avert 1954-55 winter losses....	5,000.00
Loss of job momentum and interference with job efficiency.....	5,000.00
	<hr/>
	\$ 25,975.04
	<hr/>
	\$519,761.73 ⁵⁹

⁵⁹Exh. A-208. Further breakdown of the liquidated figures in this Exhibit may be found in Exhs. A-210 and A-211.

The items we are challenging are the two \$50,000.00 items in the Jan. 9 incident and the two \$5,000.00 items in the May 20 incident, or a total of \$110,000.00. We say that the evidence fails to contain proof of these sums of damage.

The other sums were actual expenditures made by appellee in repairing the damage to its works, as shown by its books and by the testimony of Harry L. James, one of the assistants to the general manager of appellee.⁶⁰

The only evidence to support the four round figures which total \$110,000.00 is the testimony of Mr. James.

Referring to the item of \$50,000.00 for premium time, etc. in relation to the January 9 incident, James testified that, after the accident, in addition to repairing the damage to its works appellee had to go forward with the job, including completion of certain portions of this further work prior to the flood season of 1954 and 1955; that to do this, appellee incurred overtime costs due to working on Saturdays, Sundays and multiple shifts per day, as compared to a normal single-shift operation; that part of this overtime was due to speed-up necessitated by delay caused by the damage to its works; and that the first \$50,000.00 item represented an estimate of that part of the cost of this overtime which was attributable to this delay.⁶¹ He testified:

“That is *not a calculated figure* as the preceding ones were. It is *an estimate based on the judg-*

⁶⁰T. 588 et seq.

⁶¹T. 604, 605.

ment of our management of what it cost us in premium payroll payments largely, such as the premium cost of working on Saturdays and on some Sundays; the premium cost of working shift work, that is, multiple shifts, two or three shifts per day, as compared to a normal single-shift operation.”⁶² (Emphasis supplied.)

Asked whether Atkinson would not have incurred those additional expenses except for the delays caused by these two floods, he said:

“Except for the delays which forced us to speed up the work to avoid that winter situation. And I would like also to say this: That \$50,000.00 here does not represent the entire cost of such overtime premium and shift differential pay. We felt that certainly we would have been involved in some of that sort of cost in any event, and in arriving at this figure *our management decided on \$50,000.00* as being a reasonable portion of the whole which was estimated to be perhaps \$70,000.00.

Q. In the instance of this item, Mr. James, you have stated that *it is not what you call a calculated figure*, at least I take it, upon a precise total?

A. That’s right.

Q. But that it is *an estimation of Management* of a proper apportionment, is that correct?

A. That’s correct.

Q. And in making that apportionment, have you related it to actual expenditures reflected on the books as having been paid?

⁶²T. 604.

A. Well, to this extent: It is substantially less than the actual costs of the shift differential and the overtime premiums that were expended. Those amounts during the summer period of 1954, when the tail race excavation was being taken out, at that time alone, amounted to in the neighborhood of \$50,000.00, and approximately a similar cost was involved in the penstock tunnel excavation speed-up with \$18,000.00 or \$20,000.00.

Q. So that this item, then, of \$50,000.00, does not represent the total actually paid, but rather is *an apportionment based upon judgment?*

A. That's correct."⁶³ (Emphasis supplied.)

Regarding the second \$50,000.00, which was for loss of job momentum, James testified:

"That is similarly an amount that was arrived at through the exercise of *the judgment of the Management* of the job in an effort to evaluate some factors that are *not really susceptible to calculation* but can be gauged from experience on construction jobs and in that work.

They represent the loss of the efficiency of our workmen during the period following the flood. They represent what we have called the loss of momentum, which might also be described as the effect of being off balance and off schedule, and they also include such items as the cost of going out and, after the layoff that resulted from this flood, having to recruit and round up and train a new crew, and of having to weed out the new men that you have got who were undesirable for one reason or another, and find someone else.

⁶³T. 605, 606.

That sort of thing, *which I don't think anyone could possibly go on a job and calculate, except through arbitrary factors.*

The figure, I have been told, was based largely on an over-all sort of look at the loss of efficiency."⁶⁴ (Emphasis supplied.)

As to the two items of \$5,000.00 each in reference to the May 20th incident, James testified that his explanation would be the same.⁶⁵

On cross-examination James testified, regarding the two \$50,000.00 figures:

"Those were Management judgment, as I understand it, primarily by Mr. George Atkinson personally, with——

Q. Mr. George Atkinson personally?

A. Yes. And after consulting with Mr. Jennett, and very likely with others in the Management staff there.

Q. Isn't that in effect a figure that you might say reflects what you believed would be a loss in anticipated profits at the end of the job?

A. No; it does not.

Q. It doesn't?

A. No.

Q. No relation to that figure?

A. No. It anticipates or it reflects solely what we originally, at the time of this first run-down of the thing, anticipated as additional costs of doing the work which we were required to do under our contract."⁶⁶

⁶⁴T. 606, 607.

⁶⁵T. 609, 610.

⁶⁶T. 620, 621.

Also:

“To the extent that anything we spent, including these figures, would not have been spent *except* for the January flood, we certainly would have had them, or presumably would have had them at the end of the job. However, the amounts that we are asking for here are our estimate of costs and expenses to which we were put that we would not have incurred except for the January flood.

Q. The other items except for these two \$50,000.00 items on January 9th consist of direct expense and indirect expense; is that correct, sir?

A. All of the items including these two consist of direct expense and indirect expense, the principal difference being that the remaining items were susceptible of actual computation, mathematical computation, whereas these two are based on *the judgment of our top management* as to what certain costs were *that were not susceptible of mathematical computation. . . .*”⁶⁷ (Emphasis supplied.)

Conceding, for the sake of the argument, that appellee suffered some damage of the types indicated, we submit that the evidence fails to establish the amount of such damage. The law on the subject is this:

Where the evidence shows that some damage was suffered, recovery will not be denied because the *amount* of the damage is uncertain. However, the amount must not be left to speculation or conjecture,

⁶⁷T. 623.

and there must be a showing of facts so that the loss can be measured with reasonable certainty.

78 A.L.R. 858;

15 Am. Jur. 415;

Shannon v. Shaffer Oil & Refining Co. (1931),
51 F. 2d 878.

The injured party must present the best evidence reasonably available to show the amount of the damage.

Kelite Products v. Binzel (1955), 224 F. 2d 131,
145;

Stott v. Johnston (1951), 36 Cal. 2d 864, 876,
229 P. 2d 348.

Determination of the amount of damage is for the jury. The evidence must afford data, facts, and circumstances reasonably certain from which the jury may find the actual loss.

15 Am. Jur. 796;

United Electrical etc. Workers v. Oliver Corp.
(1953), 205 F. 2d 376, 387.

Damages should be proved by statements of fact rather than by the mere conclusions of witnesses. Plaintiff's mere statement or assumption that he has been damaged to a certain amount without stating any facts on which the estimate is made is too uncertain.

25 C.J.S. 813;

Kremar v. Wisconsin River Power Co. (1955),
270 Wis. 640, 72 N.W. 2d 328, 331;

Goynes v. St. Charles Dairy Inc. (1940), La.
App., 197 So. 819, 821;

Albanese v. New Haven etc. Co. (1959), 146
 Conn. 485, 152 A. 2d 505, 507;
McCracken v. Stewart (1950), 170 Kan. 129,
 223 P. 2d 963, 968.

James' testimony fails to meet these requirements.

In the first place, he is not the one who made the estimates. He testified that the estimates were made by "top management". Therefore the testimony is pure hearsay. And the hearsay is aggravated by the fact that even the sources of the hearsay are not disclosed. James said that the figures were management judgment, "*as I understand it, primarily by Mr. George Atkinson personally . . . and after consulting with Mr. Jennett, and very likely with others in the Management staff there.*" (Emphasis supplied.) Thus it is compound hearsay. Atkinson himself consulted others, *very likely*. And these others are undisclosed. And even that Atkinson made the estimates, with or without consultation with others, is not unqualifiedly true; the witness said that, as he *understood* it, it was so. To rest a judgment for \$110,000 on testimony like that violates not only fundamental legal principles but also a natural sense of justice.

Next, James concedes that the figures were not "calculated figures", that they were arrived at through the exercise of the judgment of management "in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work", that they represent the "sort of thing, which I don't think

anyone could possibly go on a job and calculate, except through arbitrary factors". This was an honest description of the process of "estimation" employed to produce these two figures of \$50,000. It is a very accurate description of the kind of evidence which is held to be insufficient to sustain an award of damage.

Finally, even if this element of damage were susceptible of computation, the facts showing the basis of the computation should have been shown by the evidence. To illustrate this point, let us consider the first item of \$50,000, the one for overtime. The work on which this overtime was incurred was work which Atkinson had to do in any event to go forward with its project, and its claim is that because of the delay caused by the washing out of the cofferdam, it had to do that work faster than it would otherwise have had to do. That involved more overtime labor than would otherwise have been necessary; and the question is, what proportion of that overtime was due to the speed-up? The way to determine that would be to consider the specific data, somewhat as follows:

First, the task on which the overtime in question was performed would have to be determined. That would constitute the starting point. Then the number of men employed on that work would be determined; then the number of hours they worked, and the amount of wages paid to them; and then the portion of those wages which constituted overtime. That would produce a definite liquidated amount of cost.

The remaining question would be, what proportion of that sum was due to the speed-up occasioned by

appellants' acts? Here is where the very important element of judgment or estimation comes in—the determination of the fraction to be applied to the definite cost figure. Obviously the fraction should not be arbitrary; it should have a reasonable basis in fact, as for example by figuring the labor cost at the ordinary rate of performance without the speed-up and attributing the remainder of the cost to the speed-up; or perhaps a contractor's cost accounting might provide other and better methods of answering the question. The point is that the law requires *some such data* to be presented in evidence to enable the jury to determine the damages, instead of permitting a witness, as was done here, to merely give the jury a figure of \$50,000 without supporting data. The latter fails utterly to meet the requirements of the law as to recoverable damages.

A similar observation relates to the second item of \$50,000, namely, the one for loss of job momentum and interference with job efficiency. Supporting data for that item would be necessary as in the case of the other \$50,000 item.

The two \$5,000 items in relation to the May 20 incident are identical in character to the two \$50,000 items, and are therefore subject to the same criticism.

It is respectfully submitted, therefore, that as to \$110,000 of the damages, the evidence is insufficient to support the judgment. This insufficiency is so glaring that the only explanation of this item in the judgment is that since it constituted only about one-fifth of the total judgment it did not get the attention that it

deserved. As a test of this, we think it inconceivable that if the lawsuit had been limited to this item of damage the judgment would be permitted to stand on evidence like that. And viewed in itself, \$110,000 is a very large sum of money.

CONCLUSION

Appellants have been subjected to an enormous verdict. They have been so subjected without their chief defense, namely that they acted in compliance with the government's directions, being presented to the jury. The trial court determined as a matter of law that they were not bound by the government's directives, whereas anyone looking at the evidence would have to concede that it would have been a rash contractor who on the day in question would have destroyed his cofferdam against the explicit command of the government and thus set back the government's project for the rest of the winter. All we are asking is that at least the issue be presented to the jury. For this reason we request that the judgment be reversed and the cause remanded for a new trial. The new trial would be applicable to the January 9 incident only, because for the reasons above stated, the error complained of is not applicable to the May 20 incident.

Next, we contend that for the reasons mentioned, even if appellants were liable, the judgment should be reversed as to \$110,000 thereof, because the evidence in regard to that sum fails in fundamental respects

to meet the legal requirements of proof of recoverable damages.

Dated, San Francisco, California,

April 18, 1961.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON,

HAROLD R. MCKINNON,

Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

INSTRUCTION REFUSED

(Specification of Error No. 1)

“Instruction No. 13

Requested by Defendants.

Subject: Governmental Defense Doctrine.

Where a party such as the defendants, Merritt-Savin, contracts with a public agency, such as the Corps of Engineers of the U. S. A., to construct a project such as Folsom Dam, according to plans, specifications and directives supplied and issued by the Corps of Engineers, and such contractor performs the project work with proper care and skill in accordance with the Corps of Engineers' plans, specifications and directives, but the work thus planned, specified and directed results in damage to others, such as the plaintiff, Guy F. Atkinson, the contractor, Merritt-Savin, is not liable for such damage unless such contract plans, specifications or directives were inherently dangerous or defective and the contractor knew, or should have known in the exercise of ordinary care, that such contract plans, specifications or directives were inherently dangerous to the property of others.

The doctrine I have just stated to you is not applicable to the events of May 13th through May 20th, 1953.

As to the events before and on January 9, 1953, it is a question of fact for the jury to determine whether

the defense afforded by this doctrine is a defense to the defendants in this case.

In this connection you may consider the question as to whether there was or was not inherent danger, and if the defendants knew or should have known of such inherent danger, if any there was, in the plans, specifications or directives of the Corps of Engineers relating to overtopping of the Folsom Cofferdam, the specified maximum elevation of 250 feet of said Cofferdam, the directives of the Corps of Engineers to the defendants to divert the American River in 1952, the provisions of Supplemental Agreement No. 1 between the Corps of Engineers and the defendants, or the directives of the Corps of Engineers to the defendants on January 9, 1953.

In this respect you are instructed that the case of the plaintiff against the U.S.A. is not a matter to be given consideration by the jury and it is not necessary for you to determine whether or not the U.S.A. is or is not liable to the plaintiff for its claimed damage, if any. The only issue in this case is whether or not the plaintiff is entitled to recover its claimed damage, if any, from the defendants.”

INSTRUCTION GIVEN

(Specification of Error No. 2)

“Now, coming to the contract here. In connection with the flood on January 9, 1953, the plans and specifications of the Folsom Dam documents, which include the contract, the plans and specifications, Supplemental Agreement No. 1, and change orders required as to the upstream cofferdam that Merritt-Savin, the contractor build an upstream diversion cofferdam at a specified location with a minimum elevation of 237 and a maximum elevation of 250. Subject only to these limitations the defendants were charged with the responsibility and had the discretion to design an upstream cofferdam of any type, to construct the cofferdam and to select the materials to be used in the construction of it. Once having completed its construction, the defendants had discretion on the operation and maintenance of the upstream cofferdam above elevation 237 and below elevation 250, which included the discretion to determine whether the upstream cofferdam would be voluntarily breached, or overtopped at elevation 250 or at any elevation down to elevation 237.

Now as I say, here, this is an instruction concerning the legal interpretation of the contract, and I am not here in any way attempting to invade your province as to determining what the facts were.”

INSTRUCTION GIVEN

(Specification of Error No. 3)

“Now, we have had some discussion here about the government contracts, and I am merely mentioning this to delimit the use of these contracts. These apply equally to both parties. The contracts set the framework in which the rights, duties and liabilities of the parties were set. It is my duty as the Court to instruct you as a matter of law as to what the rights, duties and liabilities were under the contract. Then the acts that were performed thereunder—these are matters for you to determine as to whether or not they establish any rights, duties, or liabilities within the law as I tell you about it.

Now, various provisions of the contract between the defendant Merritt-Savin and the United States, acting through the Corps of Engineers for the construction of a main dam at Folsom, and various provisions of the contract between Atkinson and the United States of America, acting through the Bureau of Reclamation for the construction of the Folsom power house, have been read to you or referred to during the trial. And certain provisions deal with the liabilities as between the parties to the contract for damage to temporary and permanent works of the project. Now, I want to make this point here, that they deal with liabilities between the parties to the contract. Here I want to point out to you that there were two contracts. There was the contract between Atkinson and the United States, that is, the plaintiff and the United States, acting through the Bureau of Recla-

mation; and then there was the contract between the defendant, Merritt-Savin, and the United States, acting through the Corps of Engineers. Now, there was no contact between Merritt-Savin and Atkinson, and the contract related to the rights, duties and liabilities of the parties involved in the contracts. So these provisions deal with the rights of the contractors and the United States in their respective contracts, and do not create any rights or obligations between the plaintiff Atkinson and Merritt-Savin in this lawsuit. You are to disregard them in that respect. For instance, in the contract between the United States and Atkinson, Atkinson assumed certain responsibilities insofar as the United States was concerned. The same is true insofar as Merritt-Savin was concerned in its contract with the United States, but Merritt-Savin cannot take advantage of any responsibility of Atkinson to the United States, nor, on the other hand, can Atkinson take advantage of any responsibility of Merritt-Savin to the United States. The point to remember here is that these contracts, when they are considered, while they set up the framework in which certain work was done, the duties of each of the contractors to the United States or the rights of each of the contractors with the United States should not be applied to the other contractor and the other contract. And I want you to make that careful distinction when you consider this matter.”

No. 17,056

United States Court of Appeals
For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division

BRIEF FOR APPELLEE

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Filed

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I.

<p>The court properly interpreted appellants' contract documents as a matter of law, and ruled that, in view of the stipulations and concessions of the appellants, their alleged "government contract defense" was not pertinent</p> <p>1. The appellants state and re-state only one single issue—their alleged "government contract defense"</p> <p style="padding-left: 20px;">A. The nature of their alleged "government contract defense"</p> <p style="padding-left: 20px;">B. The provisions of the contract documents do not support their contention</p> <p>2. Under the contract documents the appellants had complete discretion in performing the specific acts charged as negligence</p> <p style="padding-left: 20px;">A. Appellants had discretion in the design.....</p> <p style="padding-left: 20px;">B. Appellants had freedom of selection of the materials used</p> <p style="padding-left: 20px;">C. Appellants voluntarily added the sheet-piling cut-off wall</p> <p style="padding-left: 20px;">D. The appellants provided the discharge pipes...</p> <p style="padding-left: 20px;">E. The appellants increased the elevation of the upstream cofferdam from 237 to 250 without any direction from the Corps of Engineers....</p> <p style="padding-left: 20px;">F. No contract provision required appellants not to breach, or denied them the right to have a plan for controlled release of the water.....</p> <p>3. The appellants make concessions that render their "government contract defense" inapplicable to certain charges of negligence, and their proposed instructions on that subject improper</p>	<p>8</p> <p>8</p> <p>10</p> <p>11</p> <p>12</p> <p>12</p> <p>14</p> <p>14</p> <p>15</p> <p>17</p> <p>19</p> <p>20</p>
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II.

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No. 17,056

United States Court of Appeals For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This litigation arose out of the construction of the Folsom Dam and Powerhouse Project for the United States Government. The project was located about 15 miles east of Sacramento on the American River, close to Folsom, California.

The Folsom Dam and Powerhouse Project was divided into two basic units: construction of the main dam; and construction of the powerhouse.

Construction of the main dam was performed by the Appellants, Merritt, Chapman & Scott-Savin Construction Co., under a contract with the Corps of Engineers; construction of the powerhouse, on the other hand, was performed by Appellee Guy F. Atkinson Company, under a separate contract with the Bureau of Reclamation.

The powerhouse site and the working area of Appellee Atkinson were situated just downstream from the main Folsom Dam. The working areas of the two contractors were separated by a concrete wall and cellular steel cofferdam, constructed by Appellee, and designed by it to withstand without damage all normal flows of the river, including overtopping in flood season (See Figure 1, inserted opposite, for a graphic representation of the actual physical layout).

Appellants Merritt-Savin's contract with the Corps of Engineers (Exhibit A-16C) and the accompanying Plans and Specifications (Exhibit A-16A) set forth in detail the dimensions of the *main* Folsom Dam, as well as the methods and the materials to be used in constructing it.

Additionally, the Specifications provided that, for the purpose of temporarily diverting and caring for the water in the American River during the construction of the main Folsom Dam, the main dam contractor (Appellants Merritt-Savin) were to construct an upstream and a downstream cofferdam. The original Specifications provided (in Paragraph 1-05) that:

“The upstream and downstream cofferdams shall have a minimum crest elevation of 237 and

FOLSOM DAM

General Plan

of Site during
early Stage of
Construction

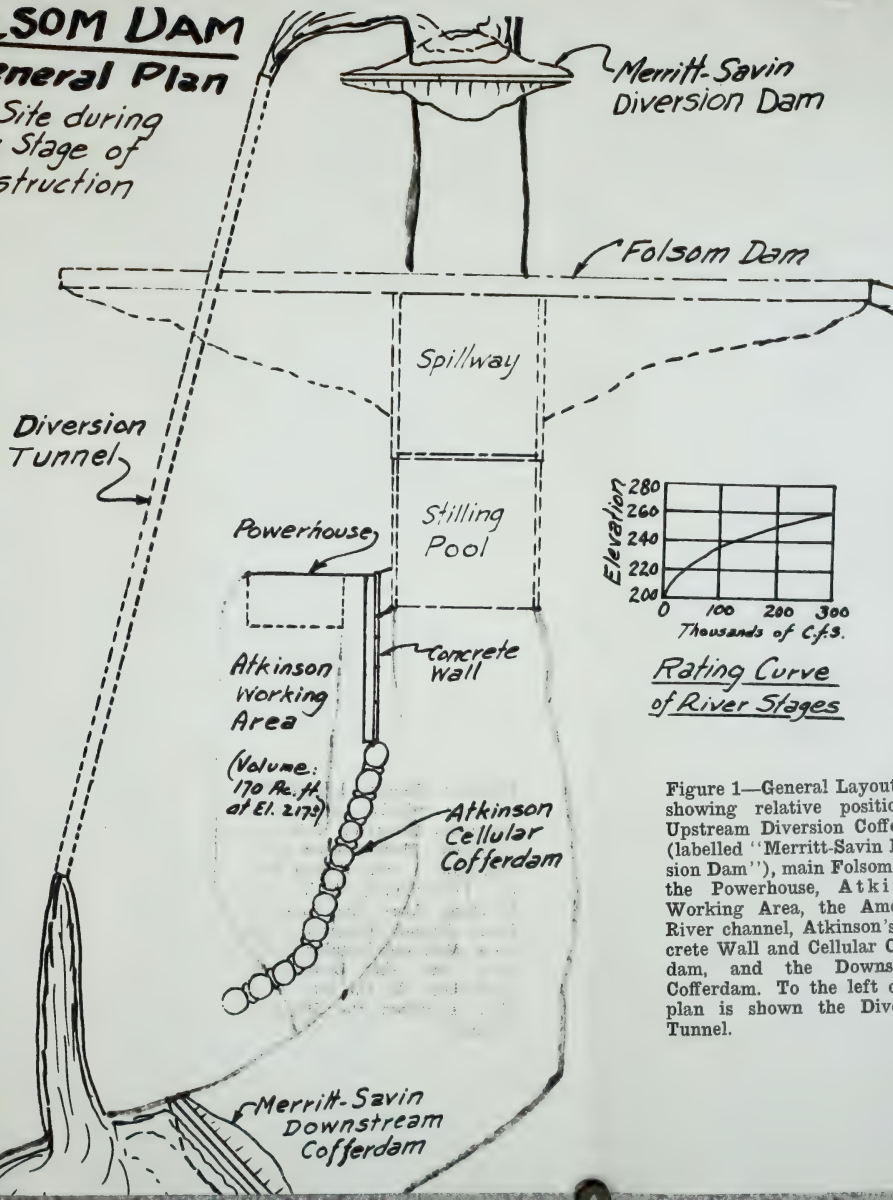


Figure 1—General Layout Plan showing relative position of Upstream Diversion Cofferdam (labelled "Merritt-Savin Diversion Dam"), main Folsom Dam, the Powerhouse, Atkinson Working Area, the American River channel, Atkinson's Concrete Wall and Cellular Cofferdam, and the Downstream Cofferdam. To the left of the plan is shown the Diversion Tunnel.

218 respectively, and shall be located at the locations indicated on the drawings.”

Subsequently, on July 9, 1952, by Supplemental Agreement No. 1 (Exhibit M-20) one more requirement was added, as follows:

“The upstream cofferdam shall not be constructed above elevation 250.”

As to the upstream cofferdam, the plans and specifications were silent as to details, except for the reference to the minimum crest elevation, its general location, and eventually the permissible maximum crest elevation.

They did not require or direct anything of the Appellants as the main dam contractor. Nothing was required or directed as to the materials to be used, the construction methods to be followed, the sequence or order of construction, or any other detail.

Neither the Corps of Engineers, nor any of its employees prepared or submitted to Appellants any plan, or even any single drawing of the upstream cofferdam (Tr. 1045). Quite to the contrary, the Specifications (Exhibit A-16A, Paragraph 1-05) provided that:

“Details of the proposed plans for diversion and for the design of the cofferdams shall be submitted to the Contracting Officer for information only . . . prior to commencement of the construction of the cofferdams.”

Actually only one drawing of the upstream cofferdam was ever made. Appellants' Project Manager David E. Stinson conceived and prepared it (Tr. 767-

768). No other drawings or plans of the upstream cofferdam were ever prepared by anyone.

Prior to the execution of Appellants' contract with the Corps of Engineers, on December 8, 1950, the Contracting Officer, Lt. Col. C. C. Haug, wrote an interpretive letter (Exhibit G-29-A-1) stating that it was the intent:

“to place the responsibility for diversion and de-watering on the Main Dam contractor except for the diversion tunnel.”

This assignment of responsibility for diversion and de-watering to the main dam contractor (the Appellants) was never changed (Tr. 1037-1038) by any of the contract documents (which include the contract, the plans and specifications, Supplemental Agreement No. 1, and the change orders).

The upstream cofferdam (labelled Merritt-Savin Diversion Dam on Figure 1, opposite p. 2) was located upstream of the main Folsom Dam. It was also upstream of the Powerhouse and Appellee Atkinson's working area. The downstream cofferdam was below Appellee's working area. In practical effect, this arrangement resulted in locking the Powerhouse site and Appellee Atkinson's working area between the upstream diversion cofferdam and the downstream cofferdam.

On January 9, 1953, as flood waters from the freshly melted snow continued to accumulate behind the upstream diversion cofferdam, it collapsed. The collapse of the cofferdam released suddenly a great ava-



Figure 3—The violently churning avalanche of water has filled the entire river channel on January 9, 1953. The force is so violent that the water is being deflected upwards 20 to 30 feet on the steel legs of these Merritt-Savin towers. The attack on these towers was so severe that they gave way, and the entire trestle collapsed and tumbled into the river channel. (Tr. 890-891, 211-213, 191-193.)



Figure 2—Frontal wave of water rushing down the river channel on January 9, 1953, sweeping away lighting tower and carrying it downstream. (Tr. 889-890, 190-191.)

lanche of water which dropped from elevation 250 feet to 145 feet, or a drop of 105 feet, the equivalent of a ten story building (Tr. 864, 887). The vast avalanche, dropping that distance, and churning violently down the confined channel generated energy equivalent to three times that produced at Niagara Falls on the American side (Tr. 888).

The avalanche violently swept away and destroyed everything in its course (See Figure 2, inserted opposite). The impact of its blow was so powerful it even demolished Appellants' steel trestle from which concrete was poured (See Figure 3, inserted opposite). The wave of the avalanche, sweeping and scouring the channel bottom and sides, carrying and hurling large rocks, crashed with tremendous force against Appellee Atkinson's cellular cofferdam (Tr. pp. 413-414, 819-821) caving in and knocking over the first five cells, flooding the working area, and demolishing equipment still in the hole (Tr. p. 213).

Following the January 9th collapse of the upstream cofferdam, Appellants rebuilt it a second time. This was in May 1953. While it was still in the process of being rebuilt it collapsed again on May 20th, under the pressure of flood waters impounded behind it. On this second collapse, although the resultant flood was smaller and less violent than the January flood, it again flooded Appellee Atkinson's working area, caused damage to their construction site, and delayed the progress of their work (Tr. 233-240).

As a result of the two collapses of the cofferdam Appellee Atkinson commenced this action for the re-

sultant damages, charging that Appellants negligently designed, constructed, operated and maintained the upstream and downstream cofferdams. Specifically, Appellee Atkinson charged that Appellants were negligent in five separate respects. These were:

(1) Failure to select and use proper materials in the construction of the upstream cofferdam;

(2) Failure to install cut-off walls or collars, or to use special compaction, around the discharge pipes in the upstream cofferdam;

(3) Raising the upstream cofferdam from elevation 237 to 250 during the flood season;

(4) Maintaining the upstream cofferdam without a prudent plan for the controlled release of the water in the flood season; and

(5) Failure to breach the upstream cofferdam and the downstream cofferdam on the days of the floods.

Appellee Atkinson claimed total damages in the amount of \$519,761.73. The jury, after hearing 18 days of trial, returned its unanimous verdict for \$519,761.73.

Appellants acknowledge that:

“The jury gave appellee a verdict for the full amount prayed for.” (Brief for Appellants, p. 3)

They then label it “an enormous verdict.” (Id., p. 42).

The jury’s deliberate action in returning a unanimous verdict for the full amount prayed for (they

deliberated from 11:32 A.M. until 10:05 P.M.) could have been influenced by these very unique aspects of the 18-day trial:

(1) Appellants did not call as witnesses a single officer or principal of either Merritt, Chapman & Scott Corporation or Savin Construction Company.

(2) They did not produce in person at the trial one single responsible managing agent of either of the Appellant firms who was present during construction of the cofferdam, or on the days when the floods occurred.

(3) They did not produce in person at the trial one single witness who actually witnessed either flood, or who participated in any way in the construction of any of their cofferdams.

(4) The only testimony from any employee of either Appellant firm was submitted in the form of the reading of parts of two depositions.

(5) Appellants' whole case consisted of the reading of portions of three depositions, and the calling of two minor employees of the Corps of Engineers and one alleged expert witness.

(6) They failed to produce one single witness, or to present any affirmative showing of any kind, on the issue of damages (as to which they now complain).

SUMMARY OF ARGUMENT

I.

The court properly interpreted Appellants' contract documents as a matter of law, and ruled that in view of the stipulations and concessions of Appellants their alleged government contract defense was not pertinent.

II.

There was ample evidence to support the jury's award of damages to compensate Appellee for the items of damage incurred by it and designated as "Loss of job momentum and interference with job efficiency" and "Premium time, and other costs to avert 1954-55 Winter losses."

ARGUMENT

I.

THE COURT PROPERLY INTERPRETED APPELLANTS' CONTRACT DOCUMENTS AS A MATTER OF LAW, AND RULED THAT, IN VIEW OF THE STIPULATIONS AND CONCESSIONS OF THE APPELLANTS, THEIR ALLEGED "GOVERNMENT CONTRACT DEFENSE" WAS NOT PERTINENT.

- 1. The Appellants State and Re-State Only One Single Issue—Their Alleged "Government Contract Defense."**

Other than attacking the amount of certain items of damages, Appellants raise only one question in their Brief (p. 3).

Basically their point is that whatever they did or did not do that might have constituted negligence, was done or not done because they were bound under their contract with the government.

Upon this sole contention they base what they choose to label the “government contract defense.”

They state and re-state this identical position time and again, as if merely repeating it ad infinitum will breathe life and substance into the claim.

To show how devoid of substance the Brief for Appellants really is, may be done by listing seriatim the many repetitions of this one identical claim:

(1) “Appellants contend that they were bound under their contract with the government to leave the cofferdam in as they did.” (Brief for Appellants, p. 3)

(2) “Which would have afforded to Appellants the defense that they acted in compliance with their contract with the government.” (Id., p. 4)

(3) “Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government.” (Id., p. 8)

(4) “In which latter two respects they were bound by the contract and directives of the government.” (Id., p. 10)

(5) “Appellants contend they were not free, but were bound by the contract to leave the cofferdam in as they did.” (Id., p. 11)

(6) “Were we required by the contract and directives of the government to leave the upper cofferdam in as we did?” (Id., p. 12)

(7) “We are looking at it to see if it did not require compliance by the contractor with government directives.” (Id., p. 19)

(8) “Whether appellants’ actions on the day of the flood were done in compliance with the contract as required by it.” (Id., p. 23)

(9) “We were bound under our contract not to do so. On the day in question the government directed us not to do so.” (Id., p. 25)

(10) “The only question is whether we were bound under the contract to defer breaching until the government consented.” (Id., p. 26)

(11) “Numerous provisions of the contract lead to the conclusion that Appellants were bound by government directives on the matter.” (Id., p. 27)

A. The Nature of Their Alleged “Government Contract Defense.”

Stripped of all repetition, the one simple issue raised by Appellants is the claim that they were exempted from liability for negligence because their actions were taken, or their omissions committed, in compliance with their contract with the Corps of Engineers. That is all there is to what they choose to term the “government contract defense.”

Appellants concede that to make it applicable, they must show that, by the contract terms, they were *bound* or *required* to do the acts which Appellee Atkinson charged to be negligence.

This is where the parties take issue (incidentally it was on this specific point that the trial judge eventually “parted company” with Appellants. Tr. 1394). The Appellants contend that they were *bound* or *required* to perform the acts charged as negligence. The Appellee Atkinson contends, to the contrary, that as to all of the acts charged and proved as negligence, the Appellants *had the unlimited discretion to do or not to do them*, and that there was nothing in Appellants’ contract with the Corps of Engineers that required them to act other than as reasonably prudent contractors in their diversion of the American River.

B. The Provisions of the Contract Documents Do Not Support Their Contention.

Appellants’ prime difficulty at the trial, and again upon this appeal, is to find in the provisions of their contract with the Corps of Engineers any support for their position.

They attempt to list the contract document provisions that they assert *required* them to perform the acts charged as negligence. (Brief of Appellants, pp. 13-23) This effort at listing the “government directives” set forth in the contract documents produces only references to such thoroughly orthodox and entirely routine clauses as the usual ones:

Requiring the contractor “to prosecute the work with faithfulness and energy”;

Requiring “progress reports”; and

Allowing the Corps to “order extras or make changes”.

Nowhere in their Brief were the Appellants able to point to any single clause or combination of clauses from the contract documents that required or directed them to defer breaching, or to leave the cofferdam in place as long as they did, or to leave it at elevation 250.

2. Under the Contract Documents the Appellants Had Complete Discretion in Performing the Specific Acts Charged as Negligence.

A concise review of what the Appellants actually did in the design, construction, operation and maintenance of the upstream diversionary cofferdam and the downstream cofferdam will be of assistance in analyzing the relationship of the acts and omissions charged as negligence to the requirements, or lack of them, in the contract documents.

A. Appellants Had Discretion in the Design.

The only drawing or plan of the upstream and downstream cofferdams was a single sheet drawing entitled "Merritt-Chapman-Scott & The Savin Co.—Details of Scheme for Diversion and Care of Water" (Exhibit A-55). This scheme or plan for diversion and care of the water was conceived by David E. Stinson, Appellants' Project Manager, and the drawing was made by Leslie G. Sumner, Appellants' Project Engineer (Tr. 767-769).

The drawing called for a rock-fill at the upstream toe with an earth fill blanket on the front of it. The rock-fill, according to the plan, would have extended two-thirds of the way to the crest at elevation 237 (Tr. 647-649, 850-851).

Actually, the cofferdam that was built was not a rock-fill dam. It was a very different type of structure than the drawing called for (Tr. 649, 851). It did not have the separation of rock-fill and earth fill as indicated on the drawing (Tr. 851). It was simply an unconsolidated, random fill of disintegrated granite, sand, earth and rock (Tr. 649). It was aptly described by O. W. Peterson, one of Appellee Atkinson's two expert witnesses, as follows (Tr. 650):

“I mean that it was built without any—it was built a good deal like Topsy; it just grew. *They have earth and they have rocks like pudding stones in the earth—like you might find an occasional plum or raisin in a pudding—and they have some rock downstream—they have some rock toe, and a little rock on the paving, but I looked at the pictures and it's essentially an earth dam with some rock mixed in it and some rock blanketing, although at the abutment that remained, I see little or no rock blankets. It is not a—the word ‘random’ was used in a report that I saw of this, and I thought it was an excellent description because that means built by chance, without any [815] effective object in mind, apparently.*”*

David E. Stinson, Appellants' Project Manager, did not appear at the trial, but use was made of part of his deposition in which he testified that his organization built this upstream diversionary cofferdam by simply picking up a mixture of rock and dirt from a dump pile, then hauled it in trucks and dumped it into the river without compaction or sorting of any kind (Tr. 777).

*Throughout this Brief, emphasis is added unless otherwise noted.

B. Appellants Had Freedom of Selection of the Materials Used.

The material used was selected by Stinson. The Corps of Engineers had nothing to do with the decision as to type or source of the material used in the cofferdams. This was made clear by Stinson in his deposition as read at the trial (Tr. 778):

“Was this source of material designated by the United States Corps of Engineers, sir?”

A. No, it was not.

Q. This was a source that you found yourself and you decided to use in the construction of the cofferdam?

A. It was there.

Q. It was there?

A. We didn't have to find it. It was there. We just excavated it and put it in there.

Q. *Did you make the decision to use the material at this particular source?*

A. Yes.”

C. Appellants Voluntarily Added the Sheet-Piling Cut-Off Wall.

The drawing of the “Scheme for Diversion and Care of the Water” did not call for a sheet-piling cut-off wall in the upstream cofferdam. Nonetheless, one was placed near the downstream toe. Stinson made the decision to place it there (Tr. 781). His purpose was to try to cut off some of the seepage underneath the dam. He was asked about the location of leakage (Tr. 782):

“Q. Could you pinpoint the locations at which this leakage occurred?”

A. *Most all the way over. Practically the whole damn coffer.”*

Both of the experienced engineers called as expert witnesses by Appellee Atkinson testified about the effect of the placing of this sheet-piling cut-off wall. Adolph J. Ackerman stated his position (Tr. 853):

“Q. What was the effect, sir, under normal construction practices and known engineering experience—what was the effect actually of driving those sheet piles on the downstream side rather than upstream or in the dam itself?

A. Well, *the location of that sheet piling violated the most elementary principles with respect to control of percolation through earth dams.*”

Similarly, Otto W. Peterson gave his experienced comment (Tr. 651):

“A. Well, that was not a favorable reference. *I don't want to be too critical, but it violates every principle of practical dam construction or engineering design.*”

D. The Appellants Provided the Discharge Pipes.

Certain large pipes, designated as “discharge pipes”, were laid on the downstream face of the upstream cofferdam by the Appellants, and then carried clear through the cofferdam at approximately elevation 234. These pipes were placed through the cofferdam just before it was completed to elevation 237. (See Exhibits A32-33, A35, A38, A42). They were placed there by Appellants for the purpose of removing seepage water from the lower working area (Tr. 779, 854-855).

Stinson testified that no measures were ever taken to compact the earth around the discharge pipes. No

collars were placed around the discharge pipes, nor was any thought ever given to placing them. No cut-off walls were placed around them (Tr. 779).

Both of the expert witnesses produced by Appellee Atkinson testified that the placement of these discharge pipes through the cofferdam without collars, cut-off walls, or even compaction, resulted in the cofferdam retaining a serious point of weakness at elevation 235, so serious that the effective height of the dam corresponded to the level of the pipes. Their testimony was that the pipes would provide an easy avenue of outlet for the water, that a progressive movement would develop, and eventually there would be a collapse resulting from the tunneling away along the pipes (Tr. 689-691, 855-856).

On this point, two of Appellants' witnesses admitted that impounding water behind the cofferdam up to elevation 249 with the discharge pipes in place at elevation 234, without protective collars or cut-off walls, was not sound construction practice or good engineering procedure (See Jack D. Brooks' testimony Tr. 1057, and Mac Silbert's answers Tr. 1328-1329).

The undisputed testimony showed that on January 9th, as the impounded water rose behind the cofferdam, heavy seepage started along the discharge pipe lines. It increased until craters began to develop in the region of the pipes. Then there were cave-ins near the pipes, and finally the cofferdam collapsed in the area of the discharge pipes (Tr. 208-210, and see Exhibit AMG-1, pp. 3-4).

E. The Appellants Increased the Elevation of the Upstream Cofferdam From 237 to 250 Without Any Direction From the Corps of Engineers.

In connection with the collapse of the dam, it is pertinent to note that, as Mr. Adolph J. Ackerman pointed out, the cofferdam was already failing on January 9th when the water was at elevation 235, the level where the discharge pipes were located. With the water at that level, the seepage was serious enough that the cofferdam was already "bleeding to death" (Tr. 875-876). Mr. Otto W. Peterson confirmed this opinion (Tr. 662-663).

On December 14, 1952 Appellants had raised the crest of the upstream cofferdam from elevation 237 to 250, by dumping on more of the same type of unassorted material used previously. It came from the same stockpile or dump. (Tr. 697, 782).

Mr. Peterson testified as to the decision to raise the cofferdam crest to elevation 250 on December 14th, right at the start of the flood season. He said (Tr. 659):

" . . . And by raising that dam right at the time that the flood season was to start—when even the lower dam should have been breached—*it was a case of moving forward into positive disaster in a normal winter in the Sierras*"

Mr. Ackerman offered detailed engineering data as to the consequences of raising the cofferdam from elevation 237 to 250 during the flood season. He stated that this change would increase the storage of water behind the dam from 1990 acre-feet to 6875, or an

increase of $3\frac{1}{2}$ times in volume. In terms of tonnage of water the increase was from 2,700,000 tons at 237 feet to 9,300,000 tons at 250, or an increase of 6,600,000 tons by adding 15 feet to the height of the cofferdam. The energy released when the impounded water broke free in avalanche proportions amounted to 400,000 horsepower, three times that produced at Niagara Falls on the American side (Tr. 884-888).

Mr. Ackerman testified that such action on the part of Appellants was not a compliance with normal construction methods. He said (Tr. 892-893):

“Q. . . . Having in mind the conditions that existed [1173] on January 9th at Folsom Dam, particularly at the Merritt-Savin upstream cofferdam, was the action of the contractor, Merritt-Savin, in allowing the water to pile up and become impounded behind the upstream cofferdam to approximately 250 elevation, without taking any steps to breach the cofferdam or release the impounded waters, a compliance with normal construction methods?

A. No, it was not.

Q. Would you explain the factors that contributed to the actual collapse of the Merritt-Savin cofferdam?

A. Well, from the diagrams, as I have described them, there was, first of all, an apparent lack of appreciation of the tremendous force which was being built up behind that diversion dam. Secondly, there appeared to be a complete lack of appreciation of the volume of water which was accumulated above elevation 235 and the consequences which would develop if that volume of water became uncontrollable and were released

suddenly into the work area. Thirdly, there was a lack—it has been a mystery to me, but for some reason that cofferdam was permitted to accumulate water after it became quite obvious it was in the process of failing due to percolation. The concepts of what happens in an earth dam in terms of seepage through it which are immediate signs of incipient failure seem to have been completely ignored.”

F. No Contract Provision Required Appellants Not to Breach, or Denied Them the Right to Have a Plan for Controlled Release of the Water.

As to the need for a plan to control the release of the water when a flood was impending, Mr. Ackerman testified that once it became evident that the water would rise to a height where the upstream diversionary dam would overtop or collapse, preparations should have been made to bring in equipment to breach the cofferdam. One or two bull-dozers would have been sufficient (Tr. 882).

He stated that, under normal construction methods, the breach would have been made near the left abutment (Tr. 883).

Appellants had no plan for the controlled release of the waters in the face of the flood. Stinson's deposition, as read at the trial, developed that there was no plan for breaching the upstream cofferdam (Tr. 793-794).

Both Mr. Ackerman and Mr. Peterson also testified that normal construction practices would have required the breaching of the downstream cofferdam

first, so as to allow the water to fill the basin up to the toe of the upstream cofferdam, thereby braking the velocity of the water being discharged from the upstream cofferdam. (Tr. 696, 869-870). This was not done by Appellants on January 9th prior to the collapse of the upstream cofferdam.

Mr. Ackerman testified that, had Appellants first breached the downstream cofferdam, it would have reduced the accumulated pressures and destructive forces by 90%. (Tr. 903-904)

3. **The Appellants Make Concessions That Render Their "Government Contract Defense" Inapplicable to Certain Charges of Negligence, and Their Proposed Instructions on That Subject Improper.**
- A. **In Their Brief Appellants Concede That They Had Complete Discretion as to Three of the Charges of Negligence.**

Appellants' treatment of the various charges of negligence discloses the utter desperation of their position upon this appeal.

They list "The Claims of Negligence" at the opening of their "Argument" (Brief for Appellants, p. 7). They spell them out as follows:

"(1) Faulty materials in the upstream cofferdam;

(2) Faulty protective covering around discharge pipes in the cofferdam;

(3) Raising the cofferdam from elevation 237 to 250 in the flood season;

(4) Maintaining it without a prudent plan for controlled, safe release of water in the flood season; and

(5) Failure to breach the cofferdam (also the lower cofferdam) on the day of the flood.”

Then, they make the following damaging concession (Id., p. 10):

“Appellee contends—and the trial court concurred—that in respect of all the items of claimed negligence, appellants had discretion, under their contract, to do what they did. Appellants, on the contrary, contend that *while they did have such discretion with respect to the first three items of claimed negligence*, namely, the character of materials in the upstream cofferdam, the insulation of the discharge pipes, and the height of the cofferdam (within the range of elevation 237 to 250), *they did not have discretion in respect of the remaining two claims of negligence, namely, lack of a plan for control of the water, and failure to breach the cofferdam, in which latter two respects they were bound by the contract and directives of the government.*”

So, at the inception of their Brief, in this one paragraph, Appellants confess that, as to three out of the five charges of negligence, there was no basis for the application of their “government contract defense”, since admittedly they had the uncontrolled discretion as to the commission of the acts and omissions upon which these three charges were based.

It must be emphasized that, at the trial, Appellants did not take any such an objective (or possibly, selective) view of the various charges of negligence. Right up to the final days of the trial they were busily charging that the “government contract defense” ap-

plied sweepingly to all of Appellee Atkinson's charges of negligence. (Tr. 1391-1393).

Even more important, and fatal to their position on this appeal, their proposed "Instruction No. 13 (Subject: Governmental Defense Doctrine)" (Brief for Appellant, Appendix i-ii) was not qualified so as to apply only to the charge of negligence based upon failure to breach the cofferdam and the charge relating to lack of a plan for the controlled release of the water. It was all-inclusive in its wording, so as to encompass all of the charges of negligence.

Patently, in view of the qualified position now taken by Appellants, they can no longer seriously urge that it was error on the part of the trial judge to refuse to give their Instruction No. 13 in the form in which it was presented.

Nonetheless, Appellants specifically urge that the refusal of the trial judge to give this instruction in the form in which they presented it was error. (Brief for Appellants, pp. 4-5).

B. At the Trial the Appellants Stipulated That They Were Not Ordered to Increase the Elevation of the Upstream Cofferdam.

At page 10 of their Brief the Appellants still contend that, as to two of the charges of negligence (failure to breach the cofferdam, and lack of a plan for the controlled release of the water), they did not have discretion, but "were bound by the contract and directives of the government."

They did not maintain their position very long on the "failure to breach" charge, for at page 17 of their Brief they concede again:

“So the contract (as amended) provided that the upper cofferdam should not be less than 237 or more than 250 elevation. *Merritt-Savin had discretion to erect it anywhere within those limits*”.

This concession of a further discretion vested in the Appellants is explained only by a foot-note referring the reader to “T. 1086, 1087”.

What a casual manner of portraying a crucial colloquy between the trial judge and counsel that fills pages 1073-1087 of the Transcript, and which resulted in the following explanatory statement by the trial judge (Tr. 1086-1087):

“The Court: The record will show that the jury is now present and seated in the box, and that the witness, Mr. Brooks, is on the stand.

Now, ladies and gentlemen, at the time we concluded yesterday, Mr. Johnson was cross-examining the witness, and he will continue with the cross-examination. But one of the reasons we have delayed starting this morning is that we had a hearing on a stipulation of fact which I think may shorten this cross-examination and take out of the case discussion about one factual issue. *The parties have stipulated that neither the Contracting Officer for the Corps of Engineers—[1592] and that, in order to identify that person, was Colonel Haug—nor any other authorized representative of the Corps, either directed or ordered the increase in the elevation of the upstream cofferdam from elevation 237 to elevation 250.*

Now this is stipulated to by the parties, and you may accept this stipulation of fact as being

proof of the fact stipulated to, without any further evidence in the matter. Now this stipulation, then, will remove from the case the arguments about who ordered the increase in the elevation in that it removes any element in the case that the Contracting Officer of the Corps or any agent of the Corps ordered it increased from the elevation 237 to elevation 250. In order to relate this, I will simply say *that in the plans and specifications for the dam, there is the minimum elevation of 237 and the maximum elevation of 250 provided, so that the contractor who had the duty to build the related structures to building the dam had the authority to build the dam anywhere from elevation 237 to 250.* Now this will remove that area of fact from examination and cross-examination.”

Appellants did not object or except to any portion of the Court’s statement. To the contrary, they stipulated to it.

So here again, Appellants have conceded that they had the unlimited discretion; in this case the unlimited discretion to build the cofferdam anywhere from elevation 237 to 250. As to the act of increasing it from 237 to 250 on December 14, 1952, they stipulated that “neither the Contracting Officer, Colonel Haug, nor any other authorized representative of the Corps of Engineers, either directed or ordered the increase.”

This voluntary act on Appellants’ part, in making the increase on December 14, 1952, was what Mr. Otto W. Peterson referred to when he said:

“By raising that dam right at the time that the flood season was to start—when even the lower dam should have been breached—*it was a case of moving forward into positive disaster in a normal winter in the Sierras.*”

C. The Contract Documents and Other Evidence Proved That Appellants Had the Responsibility for Diversion and De-Watering.

From the outset of the trial the Appellants made clear their intention of relying upon what they termed the “government contract defense.”

They referred to it throughout their opening statement (Tr. 120, 127, 136-138, 145, 147, 149-150, 157-158). It was the basis of their proposed “Instruction No. 13, Subject: Governmental Defense Doctrine” as presented at the opening of the trial.

The trial judge received in evidence as contract documents, among others, the following:

(1) The original contract between Appellants and the Corps of Engineers dated September 13, 1951 (Exhibit A-16-C);

(2) The original Specifications No. 1532 (Exhibit A-16-A);

(3) Supplemental Agreement No. 1 dated July 9, 1952 (Exhibit M-20);

(4) Change Order No. 9 dated November 3, 1952 (Exhibit M-23); and

(5) Change Order No. 15 dated February 16, 1953 (Exhibit A-66).

Evidence was received as to the action taken under them. Evidence was also received as to the responsi-

bilities of the parties under the provisions of the contract documents.

For instance, there was introduced in evidence (as Exhibit G-29-A-1) a letter of December 8, 1950 from the Contracting Officer, Lt. Colonel C. C. Haug, stating that it was the intention:

“ . . . to place the responsibility for diversion and dewatering on the Main Dam contractor . . . ”

Concerning this document, Appellants' witness Jack D. Brooks (Assistant Chief of the Design Branch of the Corps of Engineers) testified as follows (Tr. 1037-1038):

“Q. . . . And who was the main dam contractor?

A. Savin Construction, Merritt, Chapman & Scott and Savin.

Q. *So that it was their responsibility to divert the stream and dewater the project, wasn't it?*

A. *Within the scope of the specifications.*

Q. *And that was never changed, was it, sir?*

A. *No.*

* * *

Q. (By Mr. Johnson): *Now, neither Col. Haug nor any other representative of the Corps of Engineers ever changed that assignment of responsibility, did they; that is, that it was upon the main dam contractor?*

A. *Except as covered by Supplemental Agreement No. 2, or No. 1.*

Q. *That didn't change it, sir?*

A. *Not the responsibility.”*

Appellee Atkinson's expert engineering witness, Mr. Adolph J. Ackerman, was in accord with Brooks.

Asked if he understood what the same letter meant, he replied (Tr. 843-844):

“A. Yes. It means that the river handling was at one time considered as possibly a portion of the responsibility of the awarding agency, or the Corps of Engineers; but in keeping with their usual contracting practice, they have decided to place this responsibility on the contractor for the dam.

Q. That letter which was written on December 8, 1950, is consistent in that respect—on construction practices—with the actual specification as it appears in Exhibit A-16A?

A. That's right.

Q. Now, Mr. Ackerman, there has been a lot of conversation in this case about Government plan or Government design, Corps plan or Corps design. Is there anything in either of those exhibits or in any other document that you have examined that specifies that the Government or the Corps shall be responsible for diversion or control of the water?

A. No, there is nothing that specifies that, except that the Government has provided a diversion tunnel to carry the small discharges during the dry season.

Q. Well, as indicated in Colonel Haug's letter, the diversion tunnel was the only facility for river diversion or control provided by the Government, isn't that correct?

A. That's right.”

As we have pointed out previously (*supra*, pp. 11-12), Appellants attempted in their Brief (pp. 13-23) to list the provisions from the contract documents that

required or *bound* them to defer breaching the cofferdam, to leave it in place as long as they did, or that required them to maintain it at elevation 250.

They were unable to point to any one or more contract provisions requiring or directing them to take such action. Typical of their failure to find any support for their position was their effort to rely upon sub-Paragraph SC 42-f of the Specifications. They quote the whole sub-paragraph at page 18, in support of their claim that, because of the use of the word “overtopping”, they were required to maintain the upstream cofferdam at elevation 250 and therefore could not breach it.

Their contention was not supported by a reading of that sub-paragraph, or any other paragraph, of the contract documents. Nowhere in sub-Paragraph SC 42-f was there any requirement that the crest of the dam was to be maintained at elevation 250, or that “overtopping”, if there was to be any, must necessarily occur at elevation 250. During his rebuttal testimony, this was pointed up, without objection, by Mr. Ackerman, in the following manner (Tr. 1612-1613):

“Q. Is it true, sir, that under the specifications which I am holding in my hand, Merritt-Savin’s specifications, that the main dam contractor, Merritt-Savin, had the absolute, unlimited discretion for moving the elevation of the cofferdam up and down between 237 and 250?”

A. For lowering or raising the crest, you mean?

Q. Yes.

A. Yes.

Q. (By Mr. Johnson): In other words, Mr. Ackerman, what I wanted to bring out was that under the specifications, the contractor had the discretion without limitation to raise the cofferdam from 237 to 250, or to take it back down.

A. That's right.

Q. He didn't have to get any permit from the United States Corps of Engineers to do that, did he?

A. No, he did not.

Q. And is it your testimony then that cutting such a breach in the left abutment prior to the rise of the water above 237 would be normal, prudent construction methods and practices?

A. Yes, it would be."

4. The Court Properly Interpreted the Contract Documents as a Matter of Law, and Ruled That the "Government Contract Defense" Was Not a Germane Issue.

It was Appellants who raised the issue of the so-called "government contract defense." To Appellee Atkinson's several charges that they were negligent:

"Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government" (Brief for Appellants, p. 8).

Plainly, whether or not their claimed defense had any substance depended exclusively upon a proper interpretation of their contract with the Corps of Engineers.

Accordingly, the trial judge received into evidence the contract documents and testimony as to the action of the parties taken under them. There was

also testimony explaining the extent of the responsibilities of the parties under the contract documents.

Eventually, three days before the case was argued to the jury, the trial judge set aside a morning session for a discussion of the proposed instructions (commencing at Tr. 1362). At that session he reviewed at considerable length the theories of both parties, and indicated his proposed methods of disposing of them in the instructions.

Concerning Appellants' assertion of the "government contract defense" and the evidence received to develop this theory, he commented (Tr. 1401):

"The Court. . . . The theory upon which I have permitted evidence and the evidentiary approach to the matter, it seems to me, turns on the question of whether or not the conduct of parties, in acting on custom and practice in an engineering situation would depend upon their knowledge and understanding of terms that were used."

The trial judge pointed up very clearly the main point that had to be determined, when he said (Tr. p. 1393):

"The Court. Yes, I see this, Mr. Driscoll, but let me ask you this: And the key to that is as to whether or not you had to maintain that structure until it was overtopped under the plans and specifications. Isn't that the key argument?"

Mr. Driscoll. That is one of the key arguments, that's correct.

The Court. Isn't it the key one?

Mr. Driscoll. Yes, it is, your Honor."

Having pointed up the key question, and obtained Appellants' counsel's accord, the Court discussed the true interpretation of that crucial question (Tr. 1394-1395):

"The Court. That's right, and the specifications are clear that you have the authority to build that dam between the height of 237 and 250. I don't think Mr. Johnson will quarrel with your duty to build it to at least 237.

Mr. Driscoll. Right.

The Court. And no one will quarrel with that.

Mr. Driscoll. That's right, your Honor.

The Court. That is, the specifications called for that. *But between the area of 237 and 250, the specifications [1940] allow you to do it, and this is an area of discretion for you. If you exercise that discretion badly, or wrongfully, then that is negligence on your part, not on the part of the Government.*

Mr. Driscoll. If we build it wrongfully, it is negligence.

The Court. If you exercise the discretion negligently.

Mr. Driscoll. We are still following the plans and specifications, your Honor.

The Court. This is where we part company. That is number one, right there. Now, number two, and the one that is far more difficult for me, because I think here is where *you have an area of discretion between 237 and 250, and I think your stipulation puts you in that area, and there is nothing you can do about it. This is your responsibility* and not to say that you did it badly; but as a matter of fact, this is an area of responsibility which is within the discretion of the contractor."

The trial judge indicated his deliberative treatment of the question at hand, when he said (Tr. 1397) :

“The Court. . . . I believe this has to be resolved, that is what the nature of the case is, before we can come to the answer about which we have been talking. And that is the interpretation of the contract. And when I say, ‘the interpretation of the contract,’ I mean the contract with its supplemental orders, its change orders and its amendments—the whole thing, as it was in existence as of January 9th. Now, [1943] is the legal effect of that contract a question of fact or a question of law?”

Having indicated the nature of the problem before him, and his method of solving it, the Court interpreted the contract as follows (Tr. 1410) :

“The Court. . . . I have to make the basic decision and *my first impression here is that this government contract defense or governmental defense doctrine, in view of the concessions of the party, is not really a germane issue. And I suppose I am influenced in that by two or three of the stipulations and positions that the parties have taken without equivocation.*”

(Tr. 1412) :

“*. . . I am certainly going to instruct that the question of raising the dam was within the discretion, that is, raising it in elevation. I am certainly going to instruct that the materials that were to be used was within the discretion. I am certainly going to instruct that the question of how the dam [1960] should be operated above elevation 237 was within discre-*

tion. That includes overtopping and everything else, in my opinion. *That seems to me to be my approach to the law of this case.*”

(Tr. 1414):

“... It is my view that overtopping is a matter on which I have to rule as a matter of law on the basis of my understanding of the language that that was not mandatory, you didn’t have to overtop, you had discretion to either keep it there or you could do what you wanted to do down to the level of 237; that you were bound by that by the contract, and all of these other items that go to the matter of construction, they are all lumped into one. That is the way I see it, Mr. Driscoll, and, Mr. Johnson, if you will prepare instructions along that line——”

5. Controlling Legal Authorities Support the Position That the Interpretation of the Contract Documents Was a Matter of Law for the Court, Not the Jury.

The trial judge recognized that, under the law, it was the responsibility of the Court to make a ruling interpreting the contracts according to his understanding of the pertinent language. He stated a number of times his strong belief that (Tr. 1398):

“I don’t think there is a thing in the contract that would prevent you from breaching it at any time you wanted to as long as you didn’t put it down below 237” (See also Tr. 1407, 1412, and 1414).

During this entire colloquy, when the trial judge had indicated so clearly his intended interpretation, Appellants did not point to a single provision in the

contract documents requiring them to maintain the upstream diversionary cofferdam at elevation 250, or even requiring that if there was to be “overtopping”, it should occur at elevation 250.

To the contrary, their own stipulation supported the trial judge’s ultimate interpretive ruling that, between elevations 237 and 250, they had the unlimited discretion to build it up, take it down, breach it, or otherwise maintain it free of direction or control by anyone (Tr. 1394, 1395).

The rule is well-settled that the construction and interpretation of written instruments is for the trial court and not the jury.

See:

Hawkins v. Frick-Reid Supply Co. (1946, C.A. 5) 154 F. 2d 88, 89;

Trans World Airlines, Inc. v. The Travelers Indemnity Company (1959, C.A. 8) 262 F. 2d 321, 326;

R. P. Farnsworth & Co. v. Tri State Construction Co. (1959, C.A. 5) 271 F. 2d 728, 733.

In the *Trans World Airlines* case (*supra*) the airlines, as a lessee of air base facilities, sued contractors and sureties to recover damages under the contract for failure to complete the project within the stipulated time. The trial court construed the contracts, ruling that the liquidated damages provisions therein precluded recovery for actual damages sustained for delay. On appeal, the airlines argued that the trial court’s interpretation “ignores the clear agreement of

the parties” and thereby raised the issue that the terms of the contracts were ambiguous. The Court of Appeals held that there was no ambiguity in the terms of the contracts saying (p. 326) :

“The question as to whether an ambiguity exists in a contract *is to be determined by the court as a matter of law*. 17 C.J.S. Contracts § 617; *Whiting Stoker Company v. Chicago Stoker Company*, 7 Cir., 171 F.2d 248; *Golden Gate Bridge & Highway District of California v. United States*, 9 Cir., 125 F.2d 872.”

It is further established that the construction of the contract is for the trial court even though the court has permitted and heard extrinsic evidence as to the meaning and purpose of certain technical words. In the *Farnsworth* case, *supra*, the Court of Appeals for the Fifth Circuit upheld the construction of a contract by the trial court as a matter of law notwithstanding the meaning of some of the technical terms in the contract were questions of fact saying (p. 733) :

“*The construction of the written contracts was, of course, for the court*, though factual issues were presented as to the meaning and purpose of certain technical words and ambiguous terms, such as ‘pilot house’ and ‘shop drawings.’ ”

It is also settled that the mere assertion by one of the parties to a contract that the provisions of the contract are ambiguous is not sufficient as a matter of law to support the conclusion that an ambiguity existed. In *National Pigments & Chemical Co. v. C. K. Williams & Co.* (1938, C.A. 8) 99 F.2d 792, 795, the

court rejected the suggestion that a disagreement between the parties on the interpretation of contract terms is grounds for concluding that an ambiguity exists. The Court formulated general guidelines for testing the existence of such ambiguity as follows (p. 795):

“While the record sets out the history of the dealings of the parties from 1926 until 1934 under the contract, both parties agree that their provisions are unambiguous, and that the point is to be settled by a proper construction of the instruments themselves. *They are not rendered ambiguous by the fact that the parties do not now agree upon the proper construction to be given them. They were deliberately entered into, the language is clear, and its meaning can easily be determined from a consideration of the simple and harmonious facts with which they deal.*”

6. The Court's Rulings Upon the Instructions Were Proper.

A. Plaintiff's Proposed Instruction 30B Was Merely a Proper Interpretation of the Contract Documents.

As has been pointed out, during the discussion of the proposed instructions, the trial judge recognized that it was his responsibility to interpret the contract. He went on to outline some of the specific points that he intended to cover in this interpretation, and directed that appropriate instructions should be prepared by Appellee Atkinson's counsel. (Supra, pp. 30-33).

One of the instructions prepared as a result of that direction by the Court was “Plaintiff's Proposed Instruction 30B”, which was given as amended (Tr. 1760-1761):

“Now, coming to the contract here. In connection with the flood on January 9, 1953, the plans and specifications of the Folsom Dam documents, which include the contract, the plans and specifications, Supplemental Agreement No. 1, and change orders required as to the upstream cofferdam that Merritt-Savin, the contractor, build an upstream diversion cofferdam at a specified location with a minimum elevation of 237 and a maximum elevation of 250. Subject only to these limitations the defendants were charged with the responsibility and had the discretion to design an upstream cofferdam of any type, to construct the cofferdam and to select the materials to be used in the construction of it. Once having completed its construction, the defendants had discretion on the operation and maintenance of the upstream cofferdam above elevation 237 and below elevation 250, which included the discretion to determine whether the upstream cofferdam would be voluntarily breached, or over-topped at elevation 250 or at any elevation down to elevation 237.

Now as I say, here, this is an instruction concerning the legal interpretation of the contract, and I am not here in any way attempting to invade your province as to determining what the facts were.”

Appellants cite the giving of this instruction as their “Specification of Error No. 2” (Brief for Appellants, pp. 5-6).

Actually, this instruction was merely an interpretation of the contract documents, which was based entirely upon the undisputed provisions thereof, or upon the concessions or stipulations of the Appellants. It

did not deprive the jury of the right to decide any factual question.

As indicative of the scope of the concessions and stipulations of the Appellants we refer to the following:

(1) The stipulation by Appellants that no representative of the Corps of Engineers directed the increase in the elevation of the upstream cofferdam (Tr. 1086-1087);

(2) The concession by Appellants that they had discretion in the selection of materials to be used (Tr. 1412); and

(3) The concessions made by Appellants in their Brief (pp. 10 and 17) that they had complete discretion as to certain of Appellee's charges of negligence.

In view of the full extent of these stipulations and concessions, it is difficult to conceive that Appellants remain serious in claiming this to have been error. Seemingly confirmatory of this view is the fact that they do not set forth any specific discussion of the subject in their Brief.

B. Appellants State No Reason for Raising Their "Specification of Error No. 3."

As their "Specification of Error No. 3" Appellants cite in their Brief (pp. 6-7 and Appendix pp. iv-v) the giving of an interpretive instruction outlining generally the inter-relationship between the various contracts that were referred to at the trial.

Appellants did not dignify this specification with any specific discussion whatsoever, and none appears appropriate herein.

C. Appellants' Instruction on the "Government Contract Defense" Was Improper and Not Germane in View of Their Own Concessions and Stipulations.

Finally, as to Appellants' "Specification No. 1." They urge that error was committed because the trial judge rejected their proposed "Instruction No. 13—Subject: Governmental Defense Doctrine" (Brief for Appellants, pp. 4-5, Appendix, pp. i-ii).

This instruction is, as its title indicates, simply a recital in instruction form of their "government contract defense" as they would have applied it to their case.

The trial judge explained with clarity his view of both the alleged defense and of proposed Instruction No. 13, when he said (Tr. 1410-1411):

"I have to make the basic decision and my first impression here is that this government contract defense or governmental defense doctrine, in view of the concessions of the party, is not really a germane issue. And I suppose I am influenced in that by two or three of the stipulations and positions that the parties have taken without equivocation."

We have spelled out above the details of the stipulation during the trial and the concessions in the Brief for Appellants (pp. 10 and 17) which support the conclusion that the "government contract defense" was not properly an issue at the trial (*supra*, pp. 20-24). For all of those reasons it would have been error had the trial court given proposed Instruction No. 13.

As we have pointed out previously (*supra*, pp. 20-22), there is an additional ground upon which this instruction must have been rejected (*supra*, pp. 20-22). It was not qualified in its statement, so as to apply only to those two (or, possibly one) charges of negligence as to which Appellants did not concede that they had unlimited discretion. To the contrary, it was stated in language encompassing all charges of negligence.

In view of the concessions and stipulations of Appellants this was an improper statement. It is a well-established rule that if the instructions are defective in form or expression, or erroneous in law, the trial court may refuse to give them.

See:

Boyce v. The California Stage Co. (1864) 25 Cal. 460, 470;

People v. Hall (1892) 94 Cal. 595, 600-601.

Accordingly the trial court had the power to, and did properly, refuse to give Appellants' requested instruction on the government contract defense.

One additional point of clarification is needed. This proposed "Instruction No. 13" referred to "the directives of the Corps of Engineers to the defendants on January 9, 1953" (Brief for Appellants, Appendix, p. ii).

The suggestion that there were any directives to Appellants from representatives of the Corps of Engineers on January 9th is stated with a little more elaboration in their Brief (pp. 25-26), where they state:

“Appellee says we should have breached the cofferdam earlier, before the water reached damaging proportions. . . .*On the day in question the government directed us not to do so until the moment we did.*”

This statement as flatly contradicted by their own Project Manager, David E. Stinson. He was not present at the trial, but in the part of his deposition that Appellants’ counsel read to the jury he stated (Tr. 1522) :

“Q. *Turning now to the events of January 9, 1953, did anyone in the Corps of Engineers tell you that you could not breach the cofferdam until they instructed you to do so?*

A. *No, sir.*”

7. A Basic and Well-Recognized Exception to the “Government Contract Defense” Rule Would Have Rendered It of No Help to Appellants.

We have urged that, in view of the stipulations and concessions of the Appellants, the “government contract defense” was “not really a germane issue” (as the trial judge expressed it at Tr. 1410).

Even had this special defense been appropriate to the evidence adduced at the trial, there is a basic and generally recognized exception to the principle that would have prevented Appellants from urging it with any success in this litigation.

One of the authorities cited by Appellants is *Marin Municipal Water District v. Peninsula Paving Company* (1939) 34 C.A.(2d) 647, 94 P. 2d 404. They cite the case in support of the “government contract defense” (Brief for Appellants, p. 8).

This case states the general rule that they urge, but goes on to spell out in detail the exceptions to it, one of which is performance of the work "planned and specified in an improper, careless, or negligent manner." The full statement of the rule and the exceptions is as follows:

"Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (*Elliott v. County of Los Angeles* 183 Cal. 472 [191 Pac. 899]; *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257 [46 Am. St. Rep. 237, 39 Pac. 610]); but where the contractor departs from the contract plans or specifications or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed. (*Shaw v. Crocker*, 42 Cal. 435; *Reardon v. San Francisco*, 66 Cal. 492 [56 Am. Rep. 109, 6 Pac. 317]; *Eachus v. Los Angeles*, 130 Cal. 492 [80 Am. St. Rep. 147, 62 Pac. 829]; *Norton v. Ransome-Crummey Co.*, 173 Cal. 343 [159 Pac. 1177]; *Perkins v. Blauth*, 163 Cal. 782 [127 Pac. 50].) See also, *Kaufman v. Tomich*, 208 Cal. 19 [280 Pac. 130]."

II.

THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S AWARD OF DAMAGES TO COMPENSATE APPELLEE FOR THE ITEMS OF DAMAGES INCURRED BY IT AND DESIGNATED AS "LOSS OF JOB MOMENTUM AND INTERFERENCE WITH JOB EFFICIENCY" AND "PREMIUM TIME, AND OTHER COSTS TO AVERT 1954-55 WINTER LOSSES."

Appellants challenge a total of \$110,000.00 of the \$519,761.73 judgment because they claim that "the evidence fails to contain proof of these sums of damages" (Brief for Appellants, p. 33).

Actually, they are challenging two separate items of damage, both of which types of damage occurred upon each of the floods on January 9th and May 20th. Consequently, they attack a total of four items of claimed damage. These four items were stated and claimed by plaintiffs (and, incidentally, awarded by the jury), as follows:

	<u>Jan. 9, 1953 Cofferdam Collapse</u>	<u>May 20, 1953 Cofferdam Collapse</u>
"Premium time and other costs to avert 1954-55 winter losses"	\$50,000	\$5,000
"Loss of job momentum and interference with job efficiency"	50,000	5,000

Appellants state that "the only evidence to support the four round figures which total \$110,000 is the testimony of Mr. James." (Brief for Appellants, p. 33)

This statement is simply untrue.

1. **Appellee's Project Manager Testified in Detail as to the Nature of the Resultant Damages That Were Actually Incurred—Including Those Items That Appellants Now Challenge.**

As to the *actual occurrence* of the four challenged items of damage as a direct result of the floodings of Appellee's work area on both January 9th and May 20th, the record is clear and the testimony not even disputed. It is clear beyond any possible challenge that on both occasions *substantial damage was actually suffered* by appellee within the scope or type of injury designated as "Premium time and other costs to avert 1954-55 winter losses" and "Loss of job momentum and interference with job efficiency."

Quite evidently Appellants do not seriously challenge the contention that the record shows beyond dispute that such damage was actually suffered in a substantial amount. They virtually concede it, saying:

"Conceding, for the sake of argument, that *appellee suffered some damage of the types indicated*, we submit that the evidence fails to establish the amount of such damage" (Brief for Appellants, p. 37).

The uncontroverted testimony of Earl M. Jennett, Appellee's Project Manager and responsible managing agent at the job site, clearly and unequivocally proved that the two collapses of Appellants' upstream cofferdam on January 9 and May 20, 1953 caused Appellee to sustain damages convertible to dollar amounts by having to pay premium time and other costs to avert the 1954-55 winter losses, and by loss of job momentum and interference with job efficiency,

which payments and losses Appellee would not have incurred but for the two cofferdam collapses. It is significant to note that Appellants elected not to cross-examine Mr. Jennett on this particular portion of his testimony. His testimony stands clear and unrefuted. Appellants did not call any witness to challenge, minimize, or deny any of Mr. Jennett's statements that such damages were actually incurred as a direct result and consequence of the two floods.

Mr. Jennett also carefully explained his method of keeping an accurate record with respect to the damages suffered, including the four items challenged by Appellants. This was his testimony concerning these items of damage and the method of keeping records of them (Tr. 455):

“Q. And as these piles were bought and other expenditures made after the flood, were the items of expense entered into the books of account?

A. Oh, yes.

Q. That is in the books that were kept on the job?

A. Yes.

Q. And this was done generally by Mr. Chambers (Appellee's Job Accountant, Tr. 454) under your direction?

A. It was done by Mr. Chambers under my direction.”

With regard to premium pay Mr. Jennett stated (Tr. 455-456):

“Q. Did you incur in the period after the flood certain wage increases that were paid to workmen in the additional period required because of the delay?

A. Yes we did. (588)

Q. And in the normal keeping of your books of account are records kept on wage increases and the amount paid to each man?

A. Oh, yes, there is a labor contract that shows the date of the increases and the effective date of the increase.

Q. *And after the work had been shut down by reason of the flooding, did you work extra shifts and work overtime and otherwise incur what is known as premium pay?*

A. *Yes, we had—we had a great deal of that because while you might get an extension of contract time, you still have periods of weather that you have to work to and get some one part of your operations done, or maybe three or four different operations completed by a date due to weather conditions and so forth. So we did have to work a considerable amount of overtime; we had to work around the clock where we would have to pay shift premium, because in your operating engineers' union, for instance, you pay eight hours for seven hours work. So when you put on your second and third shifts you would pay eight hours and get seven hours work, so that runs up your cost per hour considerably.*

Q. *And were these extra shifts that you worked as a result of the delay incident to this flood?*

A. *Yes. On the majority of operations they were."*

With regard to loss of job momentum and interference with job efficiency Mr. Jennett testified as follows (Tr. 457):

"Q. Mr. Jennett, is it correct that the result of the flood (589) and the condition of your work

area after it happened caused any dislocation of your work progress schedule?

A. Well, there is no question that it dislocated our work schedule. It forced us to lay all of our men off; in fact, the day after the flood we sent telegrams to all of our hourly people not to report to work Monday morning because we just didn't have any place to work them. And our weekly people only came back, or monthly people came back, and as a result a great many good men we had went to other jobs, and it was quite some time before we got them back, if at any time, and people that were accustomed to working in this particular operation of ours, which required a certain amount of breaking in and good hard work in instruction and supervision on the part of the foreman—it definitely caused an inefficiency and it took us quite awhile to get back to where we were, and it has an effect, generally, I think, on the morale of your monthly people. They are all extremely interested, they are a wonderful, wonderful group of fellows I feel, in this construction business. It's their life—. . .

Q. Did these conditions that you have just referred to have a dollar value or a dollar sign on them from the contractor's point of view?

A. Yes.

Q. (Tr. 458) Explain that.

A. Well, if you have—if you are inefficient, if you are starting out with a new crew it is like starting a new job again; it takes a long time to get your crews to the point where they know exactly what they are doing, to get acquainted with their foremen, to have the foremen get acquainted with them to the point of communicating properly to get the best efforts out of these people."

Mr. Jennett stated that the same items of damage were sustained after the May 20, 1953 flood (Tr. 473):

“Q. Now, in addition to the specific items for removing the equipment, cleaning up, and unwatering, did the May 19 flood cause a general slowing down of the planned progress of the work?

A. I would say yes, and it is bound to, because any interruption like that certainly slows you (607) down.

Q. And did that piling up of the water and the muck and the debris in your hole interfere with the efficiency of your job as it had been planned?

A. Well, it certainly interfered with the efficiency of the job until we got it all cleaned up and we got back to the same point that we were in before, because, I think most of you know, pouring concrete for the Bureau of Reclamation or the Corps of Engineers or any contracting agency, there are very detailed requirements before you can get an approval to place your next lift of concrete. It has to just be about clean enough so you could eat off of it.”

2. Mr. Harry James, Assistant to Appellee's General Manager, Testified to Both the Actual Occurrence of the Challenged Items of Damage, and Their Dollar Amount.

As to the occurrence of the challenged items of damage, in addition to Project Manager Earl M. Jennett's uncontradicted testimony, Appellee also presented the testimony of Harry James, the Assistant to the General Manager of Guy F. Atkinson Company. Mr. James had been with Guy F. Atkinson Company

for 27 years. He operated out of the head office in South San Francisco, and the company's books of account were kept in his charge and the General Manager's. (Tr. 588-590)

Mr. James produced at the trial the pages from the company's books of account relative to the Folsom Powerhouse Project. He testified to the manner in which the books of account were kept (as had Mr. Jennett), and presented for admission into evidence the pages from the ledgers listing the record of the items and amounts of damages due to the two floodings at Folsom Powerhouse. He also identified and testified in detail concerning a summary sheet entitled "Folsom Powerhouse, Summary of Damages Resulting From the Failures of the M.C.S.-Savin Cofferdams on January 9 and May 20, 1953" (introduced in evidence as Exhibit A-208). He identified each item of damage listed, testified as to the nature of each item, and related what the ledger sheets reflected in each case as to dollar amount (Tr. 590-604).

Proceeding down the list of items of damage, Mr. James eventually testified specifically concerning the four items of damage that Appellants now challenge. As to them he testified (Tr. 604-606):

"Q. The next item that you show under the damages (764) resulting from the January 9th flood is No. 6 listed as 'Premium Time and Other Costs to Avert 1954-1955 Winter Losses,' and you reflect the sum of \$50,000. Would you explain that?

A. That is not a calculated figure as the preceding ones were. It is an estimate based on the

judgment of our management of what it cost us in premium payroll payments largely, such as the premium cost of working on Saturdays and on some Sundays; the premium cost of working shift work, that is, multiple shifts, two or three shifts per day, as compared to a normal single-shift operation. All of those things are situations under which you pay your workmen from one and a half to two times their normal wage rate. Let me correct that. If it is Saturday and Sunday work, that is true. For shift work typically you pay a workman eight hours' pay for seven hours' work so that——

Q. On the second shift?

A. With various crafts it is different. They are not uniform, but the typical one, as I mentioned, is that—and it may apply to all three shifts; there is where the crafts differ, I believe, but where you are working multiple shifts, you get less than a full eight hours' work for eight hours' pay and that premium is an added cost. *Those things were necessary in order to try to get the job back on schedule, or as nearly as possible, and they were largely expended in the driving of the tunnels, the tunnels that bring the water into the (765) powerhouse, and then, toward the end of the job, in doing the excavation for the tailrace channel which could not be done until the cofferdam cells had been removed because it went right through where they were located. It was necessary to expend this additional money in order to complete the job, and particularly to get the tailrace excavation out of the way before the flood season of 1954 and '55 descended on us when we would not have a cofferdam to protect the work.*

Q. And is it your statement that except for the delays caused by these two floods, you would not have encountered these additional expenses?

A. Except for the delays which forced us to speed up the work to avoid that winter situation. And I would like also to say this: That \$50,000 here does not represent the entire cost of such overtime premium and shift differential pay. We felt that certainly we would have been involved in some of that sort of cost in any event, and in arriving at this figure our management decided on \$50,000 as being a reasonable portion of the whole which was estimated to be perhaps \$70,000. (766)

Q. In the instance of this item, Mr. James, you have stated that it is not what you call a calculated figure, at least I take it, upon a precise total?

A. That's right.

Q. But that it is an estimation of Management of a proper apportionment, is that correct?

A. That's correct.

Q. And in making that apportionment, have you related it to actual expenditures reflected on the books as having been paid?

A. Well, to this extent: It is substantially less than the actual cost of the shift differential and the overtime premiums that were expended. Those amounts during the summer period of 1954, when the tail race excavation was being taken out, at that time alone, amounted to in the neighborhood of \$50,000, and approximately a similar cost was involved in the penstock tunnel excavation speedup with \$18,000 or \$20,000.

Q. So that this item, then, of \$50,000, does not represent the total actually paid, but rather is an

apportionment based upon judgment?

A. That's correct."

Concerning the damage incurred on January 9th because of "Loss of job momentum and interference with job efficiency" Mr. James testified (Tr. 606-608) :

"Q. Coming to the seventh item listed on Exhibit A-208 in evidence, under 'Damages due to the cofferdam failure on January 9th,' you list item 7, designated as 'loss of job (767) momentum and interference with job efficiency,' and here again you reflect the sum of \$50,000.

Would you explain that, please?

A. That is similarly an amount that was arrived at through the exercise of the judgment of the Management of the job in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work.

They represent the loss of the efficiency of our workmen during the period following the flood. They represent what we have called the loss of momentum, which might also be described as the effect of being off balance and off schedule, and they also include such items as the cost of going out and, after the layoff that resulted from this flood, having to recruit and round up and train a new crew, and of having to weed out the new men that you have got who were undesirable for one reason or another, and find someone else.

That sort of thing, which I don't think anyone could possibly go on a job and calculate, except through arbitrary factors.

The figure, I have been told, was based largely on an over-all sort of look at the loss of efficiency . . .

Q. (By Mr. Johnson): *Now, in the instance of this item, Mr. James, the sum of \$50,000 is based upon a judgment based upon experience of your company's administrative staff, is that correct?*

A. *That's correct."*

Mr. James' testimony was to the same effect concerning these same items of damage as incurred in the flood on May 20th (Tr. 609-610):

"Q. Now coming to the next two items, 2 and 3, which again are listed as, 'premium time and other costs to avert the 1954-55 winter losses,' in the amount of \$5,000, and the third item, 'loss of job momentum and interference with job efficiency,' in the amount of \$5,000, is the explanation in those two instances the same as on the similar items on January 9th?

A. The same, except that the period of time involved in each instance would be less.

Q. And the amount is less?

A. The amount is less."

The testimony of Mr. Jennett and Mr. James combines to complete the proof that the two collapses of the cofferdam caused substantial damage to Appellees by requiring them to pay premium time and other costs to avert 1954-55 winter losses, and by losing job momentum and interfering with job efficiency. These damages were proved to amount to \$110,000 by testimony that was neither objected to nor contradicted.

Appellants made no attempt to challenge these figures, or to introduce evidence that they were excessive. Certainly, if Appellants seriously disputed either that

such items of damage occurred or the amount, they had adequate opportunity to do so. In this connection it is important to note that Appellee, pursuant to Appellants' Motion to Produce dated February 4, 1959, one year before trial, turned over to Appellants' counsel "all and whatever documents, papers, books, accounts, correspondence, bills, vouchers, and other records upon which the plaintiff [appellee] predicates and bases its alleged damage in this case." In view of this length of time within which to prepare to meet Appellee's claims for damage, it would seem Appellants have little to complain about in so far as damages are concerned, particularly where they failed to avail themselves of the opportunity to produce any witness or other form of evidence to prove that any of Appellee's damage calculations were excessive, unsupported by the facts, or not the best evidence.

3. Leading California Precedents Support Our Contention That the Evidence on the Issue of Damages Is More Than Sufficient to Support the Judgment.

An examination of the controlling decisions of the California courts will convince anyone that they support our contention that the testimony of Mr. Jennett and Mr. James, as quoted at length above, is ample to support the jury's verdict on the challenged items.

The rule as to measuring damages for property and business loss caused through negligence is stated in *Hanlon D. & S. Co. v. Southern Pac. Co.* (1928) 92 Cal. App. 230, 268 Pac. 385. There plaintiff recovered

damages suffered from fire when defendant's train blocked the entrance to plaintiff's warehouse. Defendant contended that the damages suffered were speculative, contingent and remote. The court rejected this contention saying (p. 235):

“When the acts complained of are the proximate cause of the damage suffered the guilty party is not to be relieved merely because the extent of the damage cannot be accurately measured. (17 Cor. Jur., p. 756, 759; *Learned v. Castle*, 78 Cal. 454, 461 [18 Pac. 872, 21 Pac. 11].) It has been said that where the circumstances are such that an exact computation of the damages cannot be made, ‘*the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances, as a basis of compensatory damages for the actionable injury.*’ (*Jenkins v. Pennsylvania R. Co.*, 67 N.J.L. 331 [57 L.R.A. 309, 51 Atl. 704, 705].)”

In *California O. Co. v. Riverside-Portland Cement Co.* (1920) 50 Cal. App. 522, 525, 529, 195 Pac. 694, after recognizing the principle of the Hanlon decision, a similar conclusion as to damages was reached. Plaintiff recovered damages for injuries to plaintiff's orange orchard caused by the deposit on the trees of cement dust from defendants' cement mill. The items of damages recovered were for loss and injury to the crops for a three year period, increased labor cost in the care of the trees, and for injury to the trees which caused a decrease in crops.

(See, *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal. 2d 158, 174, 89 P. 2d 386; *Elsbach v.*

Mulligan (1934) 58 C.A. 2d 354, 366, 13 P. 2d 651; *Pye v. Eagle Lake Lumber Co.* (1924) 66 Cal. App. 584, 590, 227 Pac. 193.)

In *De Flavio v. Estell* (1959) 173 C.A. 2d 226, plaintiff, a general contractor, commenced an action for breach of a building construction contract to recover damages for loss of prospective profits. The contention was made that plaintiff failed to establish with reasonable certainty that there were damages. This contention was rejected by the court which states (p. 232):

“ ‘It is no objection to [the recovery of damages] that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible.’ (*McConnell v. Corona City Water Co.*, 149 Cal. 60, 66 [85 P. 929, 8 L.R.A. N.S. 1171]; see Civ. Code, § 3300; *Buxbom v. Smith*, 23 Cal. 2d 535, 541 [145 P. 2d 305].) Because it is difficult to measure with mathematical exactitude the detriment suffered in cases of this character, ‘it is frequently held that a reasonable certainty only is required.’ (*Hensler v. City of Los Angeles*, 124 Cal. App. 2d 71, 88 [268 P. 2d 12].) In such cases the injured party is entitled to recover damages for the profits he would have made ‘by showing how much less than the contract price it will cost to do the work or perform the contract.’ (*McConnell v. Corona City Water Co. supra.*)”

The same principles were applied in *Smith v. Shasta Electric Co.* (1961) 190 A.C.A. 810. The plaintiff sought to recover damages for the destruction of

a sawmill destroyed by fire caused by defective wiring negligently installed by defendant. In affirming the judgment the court rejected the argument that plaintiff was not entitled to damages for lost profits stating (p. 814) :

“A plaintiff’s right to recover damages for a loss of anticipated profits occasioned by reason of the defendant’s tort is now, in contradistinction to earlier decisions, generally determined by the same rules that govern his recovery of damages for other forms of detriment caused by the defendant’s conduct. Accordingly, the plaintiff may recover for a loss of anticipated profits if his loss in this regard has directly and necessarily resulted from the defendant’s wrongful act. *However, the evidence he presents to establish his loss must not be uncertain or speculative. This rule does not apply to an uncertainty concerning the amount of profits that the plaintiff, but for the defendant’s act, would have derived from a particular transaction; it refers, instead, to uncertainty or speculation as to whether or not the loss has actually occurred as a result of that act.*”

4. The Cases Cited by Appellants Actually Support the Contention That the Evidence on the Challenged Items Was More than Sufficient.

In view of the uniformity with which the rule is accepted, it is not surprising to find that, upon a careful reading, even the authorities relied upon by Appellants actually support our contention that the evidence is more than sufficient as to the challenged items.

They cite *Shannon v. Shafter Oil & Refining Co.* (1931) 51 F. 2d 878. In that case, the lessor and

owner of oil producing property brought an action to recover damages for the value of gas which the lessor alleged the lessee permitted to escape and waste. The jury rendered a verdict for defendant lessee. On appeal lessor argued that some gas escaped and therefore he was entitled to some damages. The court rejected this argument, holding that the evidence did not afford the jury any reasonable basis to compute the loss from escaping gas. With regard to damages, the court stated as follows (p. 881):

“We recognize the rule contended for by plaintiff that, where there is proof, within the permissible range of certainty, that a right of a plaintiff has been invaded, he should not be denied a substantial recovery because of the difficulty in accurately measuring his damages. *The later authorities recognize the distinction between the case where uncertainty exists as to whether any substantial damage resulted, and the case where the uncertainty exists only as to the extent of such damage.* In *Hoffer Oil Corp. v. Carpenter*, 34 F. (2d) 589, 592, we held that one who had broken his contract could not escape liability because of the lack of a perfect measure of damage. The Eighth Circuit had theretofore so held. *Calkins v. Woolworth*, 27 F. (2d) 314, 320. Williston, in his *Work on Contracts*, says: ‘*Where it is clear that substantial damage has been suffered the impossibility of proving its precise limits is no reason for denying substantial damages altogether.*’ Williston on Contracts, Vol. III, p. 2401.

“In 8 R. C. L. p. 441, the author states: ‘Formerly the tendency was to restrict the recovery to such matters as were susceptible of having at-

tached to them an exact pecuniary value, *but it is now generally held that the uncertainty referred to is uncertainty as to the fact of the damage and not as to its amount, and that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This is particularly true where, from the nature of the case, the extent of the injury and the amount of damage is not capable of exact and accurate proof.*’ ”

In another case cited by Appellants a similar statement of the applicable principles was made. This case is *Kelite v. Binzel* (1955) 224 F. 2d 131. There, plaintiff commenced an action for damages sustained when defendant delayed delivery of plaintiff's mail and converted certain property. The verdict was in favor of plaintiff. On appeal the judgment was reversed on the grounds that the instructions on punitive damages were prejudicial. However, the court rejected the contention that the issue of actual damages resulting from the delay in delivering the mail should have been kept from the jury because there was no proof of damage. In so holding the court said (pp. 144-145):

“As for appellants' contentions that no substantial damages were proved under counts 1 and 4, and that this issue should have been kept from the jury by the requested instructions, we find no merit in them. Binzel did prove at least the loss of interest on the checks delayed in the mails, amounting to ten to twenty dollars, very substantial annoyance and inconvenience in having to have his mail delayed and photostated, and invasion of his privacy. This was certainly suffi-

cient without more to support an award of compensatory damages on these counts. Appellants objected to, and the court properly excluded, evidence of diminished profits of Binzel's business, because it was too remote and speculative, since he had changed to another line of cleaning compounds. This is obviously a difficulty present in proving damages for any such disruption of business. The law does not require an impossible precision in the proof of such damages. We think the proper principle is stated in Restatement, Torts § 912, Comment d:

'Where there is an interference with intangible rights, such as an interference with a business, there may be great difficulty in proving the existence or amount of loss with any degree of certainty. * * Although in such cases, the burden is on the injured person to prove with a fair degree of certainty that the business or transaction was or would have been profitable, it is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm which the defendant has caused. It is only essential that he present such evidence as might reasonably be expected to be available under the circumstances.'*"

A third case cited by Appellants which actually supports our position is *United Electrical, R & M Workers v. Oliver Corp.* (1953) 205 F. 2d 376. The Oliver Corporation commenced an action for breach of contract to recover from defendant unions damages that it incurred during a strike. The judgment entered on a jury verdict for plaintiff was affirmed

on appeal. Defendants contended on appeal that the measure of damages was improper. The court disclaimed this contention and held as follows (p. 389):

“Implicit in defendants’ contention is an admission of the fact of damage to the plaintiff. Their objection goes only to the method by which the amount of plaintiff’s damage is computed. *In determining the amount of an admitted damage mathematical accuracy is not required of juries. It is sufficient that a reasonable estimate based on relevant factors is reached.* A jury may not render a verdict based on speculation or guesswork, even where the defendant by his own wrong has precluded a more precise computation of damages. ‘But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as (upon) direct and positive proof.’ *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L. Ed. 652.”

Fortunately, a California case cited by Appellants supports our position. *Stott v. Johnston* (1951) 36 Cal. 2d 864 provides a specific example of the application of the above principles with regard to damages. Plaintiff, a painting decorator, brought this action against defendant, the operator of a paint company, for breach of warranty, to recover damages for, among other things, loss of good will. The jury returned a verdict of \$10,000 for loss of good will. In affirming this portion of the jury award the court held (p. 875):

“The propriety of the allowance of \$10,000 to plaintiff for the loss of good will must be considered in relation to the nature of the evidence available to plaintiff in proof of this issue. Analogous considerations have arisen in cases where recovery for loss of future profits was sought, and *the courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment.* (See Anno. 78 A.L.R. 858; 25 C.J.S. § 28, pp. 493-496.)”

As to the rest of the cases relied upon by Appellants, there is nothing in *Kremer v. Wisconsin River Power Co.* (1955, Wis.) 72 N.W. 2d 328, 331 that alters the above stated principles with regard to damages. The court in the *Kremer* case reversed a judgment for plaintiff and ordered a new trial on the issue of damages on the ground that the evidence failed to support the jury's finding as to damages, since plaintiff did not show that the negligent act of defendant in allowing water to seep on his farm land was the proximate cause of the damages claimed.

In *Goynes v. St. Charles Dairy* (1940, La.) 197 So. 819, the court reversed an award of \$150 for general damages in an action for a negligent automobile collision on the ground that there was no evidence on

which to sustain the judgment. *Albanese v. New Haven, etc. Co.* (1959, Conn.) 152 A. 2d 505 is to the same effect, wherein the court held that there was no evidence to support the full award for damages to plaintiffs' house caused by defendants' blasting operations.

In *McCracken v. Stewart* (1950, Kansas) 223 P. 2d 963, an action for personal injuries, plaintiff sought damages for prospective profits. On this issue plaintiff testified that he was a partner in the janitorial supply firm, and over the objection of defendant's counsel, stated from memory, his average daily income immediately prior to the date of the accident. Nowhere did he state that he had lost the business and financial records of his firm. Nor did the record on appeal show whether he was testifying as to gross income, net income, partnership or personal income. The court held that this evidence was insufficient to support the award of damages for prospective profits because it was based on mere opinion without regard to specific facts or knowledge upon which the opinion was based.

Clearly these cases do not affect or relate to the basis of the damage award in this case.

5. Where Substantial Damage Has Been Proved, a Substantial Recovery Is Not to Be Denied Because of Difficulty in Measuring Its Extent With Exactitude.

All of the later and better reasoned authorities, whether those cited by Appellants or those relied upon by Appellee, recognize the rule that, where a party plaintiff has proved by proper evidence that he

has suffered a substantial damage, he should not be denied a substantial recovery because of some difficulty in measuring with accuracy and exactitude the extent of his damage in dollar value.

Recognition must be given to the distinction between a case of uncertainty as to whether damage actually resulted, and one of uncertainty existing, if at all, only as to the extent of the damage.

Having in mind both the proper distinction and the true rule of damages, Appellants' argument on the damage issue cannot be sustained. Both Mr. Jennett and Mr. James testified without contradiction as to the actual occurrence of the damage items now challenged. The undisputed physical evidence supported their testimony, and proved beyond question that the types of damage that were claimed had actually occurred, and that it was very substantial.

Concerning the extent of the damage, or its translation into actual dollar value, Harry James testified that the four challenged items aggregating \$110,000 were:

“... arrived at through the exercise of the judgment of the Management of the job in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work.” (Tr. 607, 623.)

In practical effect what Mr. James stated was that the amounts of the four challenged items were measured and determined by Appellee in exactly the same manner in which any experienced contractor prepares

his bid on even the largest and most complicated construction projects—by the exercise of top management's judgment based on past experience.

The method of measuring and determining the amount of damages claimed by Appellee for the four challenged items, as testified to by Mr. Harry James, was strictly in conformity with that method of admeasurement of dollar value which years of experience of the best minds of the construction and engineering professions have found to be best suited to the accurate measurement of cost items with the maximum of exactitude. It is submitted that this characterization of it is certainly more apt than Appellants' statement that:

“It is a very accurate description of the kind of evidence which is held to be insufficient to sustain an award of damage” (Brief for Appellants, p. 40).

That Appellants themselves were not convinced of the accuracy of their characterization of Mr. James' testimony was demonstrated by the fact that, at the trial, they:

- (1) Failed to make any objection that it was not the best evidence;
- (2) Failed to move to strike it from the record;
- (3) Failed to cross-examine him in greater detail as to the basis and details of his figures; and
- (4) Failed to call any witness to contradict, or even to minimize, his admeasurement of the dollar value of damages on the four challenged items.

CONCLUSION.

1. As has been pointed out previously, the Brief for Appellants presented only one issue, other than the attack of certain items of damages.

They stated and re-stated it many times. Always it was the same: that whatever they did or did not do on January 9th, 1953, was done or was not done because they were bound by the provisions of a government contract.

This was their "government contract defense." That is all that there is to it, except that because of it they claim that they were exempted from liability for negligence.

Even in their own "Conclusion" they still assert it, and claim that they "have been subjected to an enormous verdict without their chief defense, namely that they acted in compliance with the government's directions."

To urge that point seriously is to ignore, or not to appreciate the significance and the import of their own stipulations and concessions. The doctrine upon which they place exclusive reliance on this appeal is simply inapplicable to this litigation because of their own stipulations and concessions, as well as the plain language of the contract documents.

Without it there is no support for their claim—nor do they urge that there is.

2. As to their attack upon the items of damage: again they have completely overlooked material evi-

dence that was not disputed, or even minimized. In this case it was substantial evidence (both oral, pictorial and physical) showing that the types of damages claimed actually occurred.

Both the evidence as a whole, and the controlling leading authorities (including those cited by the Appellants), support the Appellee's showing as being more than sufficient.

3. No reason has been shown for reversing or reducing the verdict and judgment.

The judgment should be affirmed.

Dated, San Francisco, California,

June 29, 1961.

Respectfully submitted,

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No. 17,056
United States Court of Appeals
For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I

APPELLANTS WERE ERRONEOUSLY DEPRIVED OF PRESENTING THEIR GOVERNMENT CONTRACT DEFENSE TO THE JURY

Our point is that by a ruling of the trial court appellants were erroneously deprived of presenting the government contract defense to the jury. The defense was that in leaving the cofferdam in as they did on the day in question appellants were acting pursuant to the contract and directives of the government,

and that such fact exempts them from liability to appellee in respect of that handling of the cofferdam. There is no argument about the doctrine. The issue was one of fact, namely whether appellants were bound by the contract and directives to act as they did. The trial court ruled that they were not, and it therefore declined to present the issue to the jury. We say they were so bound and therefore were entitled to present the defense. In our opening brief we gave our reasons for our contention. We will now respond to appellee's arguments in that respect.

A. Under the Directives and the Contract, Appellants Were Bound Not to Breach the Cofferdam Until They Did.

The evidence shows that about 10:00 A.M. on July 9 appellants suggested to the government that appellants take out their equipment; that the government told appellants not to do so until it would so advise them; that about noon the government told appellants to pull the equipment out; that appellants then began to do so and got most of it out by 5:00 P.M.; that about 4:00 P.M. the government told appellants to breach the cofferdam, i.e., cut a notch in the top of it, which appellants then did; and that about 6:00 P.M. the cofferdam gave way.

Appellee argues that the contract contains no provision requiring appellants to defer breaching, and it says that all we have been able to show in this regard consists of such routine clauses as the ones requiring faithful and energetic prosecution of the work and the rendering of progress reports and allowing the government to order extras.

This is a misrepresentation of our brief, and a failure to meet our argument.

In our opening brief we pointed out the provisions of the contract which we say gave the government authority over appellants in regard to breaching the cofferdam, such provisions as the one giving the government "general direction" of the work, the one requiring appellants to concentrate on getting the permanent dam up to elevation 220 by the end of the first diversion season, the one requiring appellants to work as large a force of men and as much plant as much time as practicable, the one that gave the government the right to terminate the contract for failure to comply with requirements, and so on. We respectfully refer the Court to these clauses, which we have listed in our opening brief (pp. 18 to 23, 26 to 28), and to the fact that breaching would wipe out the cofferdam, the normal result of which would be that the construction of the dam would be suspended until June or July. These provisions, and the all-pervading objective of getting on with the work without delay created a situation in which, we say, it would have been rash for the contractor to have defied the government by breaching the cofferdam on the night of January 8 or the morning of the 9th against the order of the government's representative on the job.

It is easy to look back now, as the government engineer testified, and say that the cofferdam should have been removed earlier. But at the time the government said no, and it was the government's dam, and with the grave consequences of any delay, and with the

clauses of the contract to which we have referred, we say that appellants did *not* have the “unlimited discretion” which appellee claims but were bound to act as they did. At the very least, we say, we had the right to present to the jury the issue of whether we were.

Appellee argues that appellants acted freely with respect to the design, materials and construction of the cofferdam, including raising it from elevation 237 to 250, and it argues that appellants were negligent in those respects.

But those matters are not involved in this appeal. Appellants had discretion with respect to those matters. This appeal is based on the contention that appellants did not have such discretion with respect to breaching the cofferdam on January 8 and 9, and that that gives them the right to the government contract defense as to that issue, and since we cannot tell whether the jury held appellants liable on that issue the deprivation of the defense is prejudicial.

B. Appellants Had the Right to Present the Government Contract Defense to the Jury.

In our opening brief we stated the doctrine of this defense and why it should have been presented to the jury. We now respond to appellee’s arguments on this subject.

First, it says that we are now changing our position from that taken at the trial. It says that at the trial we contended that the government contract defense applied to all the alleged acts of negligence of

appellants, and that now we concede it applies only to the claim that appellants were negligent in not earlier breaching the cofferdam.

At the trial there was a long colloquy between the trial judge and counsel on this subject. Contrary to appellee's present contention, appellants' counsel then conceded that the only issue in which he was invoking the government defense doctrine was the one of not having breached the cofferdam earlier. The various items of alleged negligence were explicitly discussed in respect of this very point. The question was whether appellants had been bound by the government contract in respect of those items of work or whether they had discretion to act as they saw fit in those respects. Appellants' counsel then conceded that appellants had had the right to exercise their own discretion regarding the materials of the cofferdam and raising its elevation from 237 to 250. It was then expressly understood that the only matter under discussion with respect to the government contract defense was that of deferring the breaching of the cofferdam until the government permitted it. This is evident from the following:

“The Court. Now, then, the discretion that seems to be the only one that we have an argument about is the discretion with respect to maintenance of the elevation of the dam, whatever it was, when flood conditions occurred, where you had the right to breach it——

Mr. Driscoll. [attorney for appellants] That's right.”¹

¹T. 1413. The whole colloquy runs from about page 1377 to page 1415.

Appellee also argues that our proposed instruction on the government contract defense was not limited to the failure to breach but included all the claimed acts of negligence.

The instruction requested by appellants had been prepared prior to the above colloquy. At the end of the colloquy, the trial judge said that the parties would have their chance to amend instructions.² The judge had made his position perfectly clear, however. In fact, he later added:

“It doesn’t seem to me that I am going to get into this inherently dangerous argument³ at all. I am trying to stay away from it. It may be I have committed an error in doing it, but I considered it to be the most difficult question in the case.”⁴

In view of the judge’s decision on this subject, it would have been useless to amend our proposed instruction to limit it to breaching and ask the court to repeat its ruling.

Besides, the point is presented on this appeal also by the instruction which the judge actually gave. This is the instruction referred to in our Specifications of Error No. 2,⁵ in which the court instructed the jury that defendants had discretion to determine whether the cofferdam would be breached.

²T. 1415.

³By this he meant the government contract defense.

⁴T. 1436.

⁵Appendix to the opening Brief for Appellants, p. iii.

Appellee argues that we are precluded from our present contention by a stipulation at the trial. That was the stipulation that under their contract appellants had discretion to erect the cofferdam anywhere between elevations 237 and 250, and that when appellants raised it from 237 to 250 they did so without direction from the government.

Appellants' discretion as between elevations 237 and 250 had nothing to do with the question whether appellants could breach the cofferdam on January 8 or 9. Breaching would wipe out the cofferdam altogether, not bring it down to any specified height.

Appellee quotes evidence that diversion of water was the responsibility of appellants, by which is meant the cofferdam. It is true that appellants had to build and maintain the cofferdam. But we say that our custody of the cofferdam was not absolute so that we could breach it with impunity against the express directions of the government.

They say that appellants had discretion to move it up or down between elevations 237 and 250, and that they could have breached at 237 as well as 250. But that is not the question. Breaching it at any elevation would wipe the cofferdam out entirely. The question is whether we had to obey the government's directive in deferring the breaching, and we think that at the very least that question should have been presented to the jury.

C. Whether Appellants Were Bound Was a Question of Fact for the Jury.

Appellee argues that the interpretation of the contract was a matter of law for the trial judge.

As indicated in our opening brief, we disagree. As stated by appellee in its brief, the trial judge received into evidence the contract documents and testimony as to the action of the parties taken under them, and testimony explaining the extent of the responsibility of the parties under the contract documents.

Appellee states that the construction of written instruments is for the trial court and not the jury. That is sometimes true, sometimes not. The distinction is stated in *Hawkins v. Frick-Reid Supply Corporation* (1946), 154 F.2d 88, 89:

“While the construction of a contract is ordinarily for the court, if the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact. [Citing cases]”

The rule is also cited in 53 Am.Jur. 229, 230, as follows:

“Even though a written contract is ambiguous and extrinsic evidence on the matter of intention has been introduced, it is still within the province of the court to construe the writing where the extraneous matter is undisputed and unambiguous. It is only where the extrinsic evidence is unconceded, conflicting, ambiguous, *or such that a reasonable man might draw different inferences therefrom*, that such evidence, with the written

contract, should be submitted to the jury. But where the contract is not clear or is ambiguous, and, *even though the evidence is not conflicting, different reasonable conclusions are possible*, the question is one for the jury.” (Emphasis supplied.)

It is also stated at 65 A.L.R. 652:

“It has frequently been held that, even though the written contract is ambiguous and extrinsic evidence on the matter of intention has been introduced, it still is within the province of the court to construe the writing where such extraneous matter is undisputed and unambiguous, and that it is only where the extrinsic evidence is unconceded, *conflicting*, ambiguous, or such *that a reasonable man might draw different inferences therefrom*, that such evidence, with the written contract, should be submitted to the jury. [Citing cases]” (Emphasis supplied.)

Cases cited by appellee do not conflict with the above doctrine. In the *Trans World Airlines* case, the court held that no ambiguity existed. Appellee cites the *Farnsworth* case because of a statement in it that the construction of a contract is for the court even though factual issues are presented as to the meaning and purpose of certain technical and ambiguous terms such as “pilot house” and “shop drawings”. Reference to the opinion of the court clearly indicates that it does not conflict with the principles above cited. In the *National Pigments & Chemical Co.* case the parties themselves agreed that the contract was unambiguous, and the court properly held that the contract is

not rendered ambiguous by the fact that at the trial the parties do not agree upon the construction.

We believe that the provisions of the contract in the case at bar required appellants to obey the directives of the government as to breaching the cofferdam. We believe that in any event, the contract is open to that interpretation, and therefore must be considered at least ambiguous in that respect. In that event, the construction of it depends upon all the facts and circumstances, including the facts that this dam was being built for the government, that time was important and any delay serious, that breaching the cofferdam would cause a long delay, that appellants were to stay in the river as long as possible, that the consequences of disobeying a directive of the government on the day in question would be very serious to appellants if the contract were to be interpreted as we have indicated, that inferences were to be drawn from the way the parties acted prior to the flood and during it, and so forth. In other words, the construction of the contract on this important point involved not only the wording of the agreement, but the whole context of events, and we contend that at the very least it must be said that conflicting inferences could be drawn from such a record of facts, and in such case it is a question of fact for the jury to determine the intent of the parties.

D. The Instructions.

We complain of the instruction given by the court. (Spec. No. 2; Appendix, Brief for Appellants, p. iii.)

Appellee says it was based entirely upon undisputed provisions of the contract or concessions of appellants. As we have shown, the terms of the contract and the context of events are open to the opposite interpretation. This is illustrated by the trial judge's own hesitancy, his comment that it was the most difficult question in the case to decide, that he may have committed an error in his ruling, and so on.

Appellee also says that the instruction did not deprive the jury of the right to decide any factual question. On the contrary, it told them that appellants did have the discretion regarding the breaching of the cofferdam, which effectually removed the factual basis of the government contract defense.

The court instructed (Appendix, Brief for Appellants, pp. iv, v) that appellants' contract had nothing to do with appellee's contract, and that the duties of each contractor with the government should not be applied to the other contractor.

That instruction aggravated the error of the previous one in that, according to our contention, it was the duty of appellants under their contract to obey the directives of the government regarding the delaying of the breaching.

The court refused the instruction requested by appellants. (Appendix, Brief for Appellants, pp. i, ii.)

In our argument above, we have covered the contentions of appellee on this point, except one; that is

the argument made by appellee in its brief that the government did *not* tell appellants on January 9 that they could not breach the cofferdam until the government instructed them to do so. This is based on testimony to that effect by Stinson.⁶ But that testimony is immediately followed by this further testimony of Stinson, which appellee fails to quote:

“Q. And no one from the Corps of Engineers told you that you could not pull out your equipment out of the hole until you were instructed to do so, did they?

A. I stated that, that Mr. Jenkinson told us not to pull the pumps out of the hold until he heard from Sacramento.

Q. Now, did he suggest that to you, or did he instruct you that you could do it?

A. He told me not to, that Sacramento told him to tell me to leave the pumps in there’’.⁷

The direction to leave the equipment in is equivalent to a direction not to breach, because removal of equipment would naturally precede breaching.

E. Exception to Government Contract Defense Doctrine Not Applicable.

Appellee quotes authority that where the contractor departs from the contract specifications or goes beyond them, or does the work specified in a negligent manner he is responsible.

That is true, but the exceptions mentioned are not applicable to the case at bar. Appellants did not act

⁶Quoted in Brief for Appellee, p. 41.

⁷T. 1522.

at variance with the specifications. And they committed no independent negligence. And if it be claimed that there was issue as to those points, such issues would be given to the jury to decide.

II

IN ANY EVENT, \$110,000 OF THE JUDGMENT WAS IMPROPER

In our opening brief, we pointed out that there were four round figure items of damages totalling \$110,000, on which the evidence was grossly insufficient to sustain the verdict.

Appellee responds with several contentions, which we will now discuss.

Appellee first challenges our statement that the only evidence to support the four round figures (\$50,000 twice, and \$5,000 twice) is the testimony of appellee's witness James, and in that respect they cite the testimony of their project manager, Jennett.

But Jennett's testimony does not relate to the point at issue, i.e., the *amount* of the damage. He said there was a money loss due to overtime and loss of momentum from lay off. But we are conceding that, for the sake of argument. The issue is whether there is evidence to support the *amounts*, totalling \$110,000.

Appellee cites James' testimony. We too set that out in our opening brief, and we there showed that it was inadequate to support the verdict, as to the \$110,000, for several reasons. One was that it was

hearsay, because Mr. James said he based it on estimates of management consisting, as he *understood* it, of Mr. Atkinson and *very likely others*. Another was James' testimony that it was not a *calculated* figure but a judgment of factors *not really susceptible to calculation*, the sort of thing that is incalculable *except through arbitrary factors*. Another reason why the evidence is inadequate on this point is that it offered the jury no basis for determining the amount, that is the pro rata of the expenses of this type which was attributable to the collapse of the cofferdam but gave them merely round figure estimates without the method of computation.

Appellee says we did not object to the testimony. This is not so. Appellants did object, as follows:

“Mr. Driscoll. Your Honor . . . this gentleman is saying what he has been told. I do have an objection.”⁸

Appellee argues that we did not contradict or challenge the figures or introduce evidence that they were excessive. Aside from the fact that the figures were hearsay and therefore did not warrant rebuttal, there was no obligation on appellants to offer evidence on the subject of damages. The burden was on appellee to prove its damages, and for the various reasons mentioned above, it failed to prove the items in question.

Appellee discusses the authorities. There is no dispute as to the legal doctrine.

The general rule is that in a case like this exact computation of the amount of damage is not required.

⁸T. 607.

But plaintiff must present the best evidence available; that evidence must afford a reasonable basis for estimating the loss; and it must consist of data from which the jury may determine damages and not consist of mere conclusions of witnesses without facts on which the estimate is based.

The evidence here fails to meet these fundamental requirements. There was evidence that damage *was incurred*. But that is not the issue. The issue is the *amount* of the damage. As to that, the evidence fails to meet the requirements above mentioned. It is a series of estimates without reasonable bases, and hearsay. We think it patently insufficient to support the award of \$110,000.

CONCLUSION

We respectfully submit that the judgment should be reversed because appellants were erroneously deprived of presenting their government contract defense to the jury.

We further submit that in any event the evidence is insufficient to support the judgment to the extent of \$110,000.

Dated, San Francisco, California,

July 17, 1961.

Respectfully submitted,

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Attorneys for Appellants.

